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PREFATORY NOTE

The purpose of this official publication is to make available to the public, in an orderly and accessible form, decisions and orders issued by the Secretary of Agriculture, or those officers authorized by law to act in his stead, under laws administered by the Department of Agriculture.

The decisions published herein result from formal adjudicatory administrative proceedings instituted by the Department, under designated statutes and regulations, after notice and hearing or opportunity for a hearing This publication does not include rules and regulations which are required to be published in the Federal Register.

Consent decisions entered subsequent to December 31, 1986 are not published herein. These Consent decisions are on file and may be inspected upon request to the Hearing Clerk, Office of Administrative Law Judges. However, a list of these decisions is published herein. (53 F R. 6999, March 4, 1988)

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921, (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 et seq.), the Poultry Products Inspection Act (21 U.S.C. 451 et seq.), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151-158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume number and page number, for illustration 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

This publication also contains current court decisions of interest involving the regulatory laws administered by the Department.

TABLE OF CONTENTS

JANUARY 1987

LIST OF DECISIONS REPORTED

JANUARY 1987

LIST OF DECISIONS REPORTED

Disciplinary Decisions:

Reparation Decisions:

LIST OF DECISIONS REPORTED

PERISHABLE AGRICULTURAL COMMODITIES ACT

Court Decisions:

Disciplinary Decisions:

Reparation Decisions:

LIST OF DECISIONS REPORTED

LIST OF DECISIONS REPORTED

LIST OF DECISIONS REPORTED

CONSENT DECISIONS ISSUED

JANUARY 1987

Animal Quarantine

DIAMOS, EDWARD GEORGE and RANDY L. BAKER. A.Q. Docket No. 287. (As to Edward George Diamos.) 1/15/87

KEMP, THOMAS A. A.Q. Docket No. 220. 1/27/87

MCCAULEY, DR. ALAN D., D.V.M. V.A. Docket No. 36. 1/21/87.

RANKIN, DOYLE. A.Q. Docket No. 255. 1/5/87

Animal Welfare Act

EMERY AIR FREIGHT CORPORATION. AWA Docket No. 363. 1/7/87

HARDY, EDGAR AWA Docket No. 415. 1/8/87

Egg Research and Consumer Information Act

WILKIE, JERRY, d/b/a WILKIE POULTRY FARMS. ERCIA Docket No. 9. 1/6/87

Federal Meat Inspection Act

STATE NATIONAL PROVISIONS, INC. FMIA Docket No. 97. 1/27/87

Packers and Stockyards Act

BELMONT LIVESTOCK MARKET, INC. P&S Docket No. 6690. 1/9/87

CARLO, EDWARD J. P&S Docket No. 6610. 1/9/87

OGLE, WAYNE J. P&S Docket No. 6798. 1/15/87

PRODUCERS MARKETING ASSOCIATION, INC., and BERNARD DAUBY. P&S Docket No. 6821. (As to Producers Marketing Association, Inc.) 1/23/87

AGRICULTURAL MARKETING AGREEMENT ACT, 1937
Cite as 46 A.D. 00

In re: PETER GOOSE, d/b/a QUEEN OF THE NUTS. AMA Docket No. F&V 981-3. Order filed December 9, 1986.

Petitioner, *pro se*.

Howard Haas, for respondent

Order issued by Victor W. Palmer, Acting Chief Administrative Law Judge.

MOTION TO DISMISS

For good cause shown, respondent's motion to dismiss the Petition without prejudice in this proceeding is granted.

In re: CUMBERLAND FARMS FOOD STORES, INC. and CUMBERLAND FARMS, INC. AMAA Docket No. M MM-5. Order filed January 13, 1987.

Marvin Beshore, Harrisburg, Pennsylvania, for petitioner.

Donald Tracy, for respondent.

Order issued by William J. Weber, Administrative Law Judge.

ORDER

Pursuant to the Application filed by Petitioners, Cumberland Farms Food Stores, Inc. and Cumberland Farms, Inc., permission to withdraw the Petition is granted and the matter is dismissed without prejudice.

In re: DARREL FOCKEN. A.Q. Docket No. 64. Ruling filed September 5, 1984.

Failure to deny allegations in complaint—Mitigating circumstances unpersuasive.

The Judicial Officer ruled on questions certified by Judge Weber that complainant's motion for adoption of a decision imposing a $1,000 civil penalty for violations of the Animal Quarantine and Related Laws involving the movement interstate of 13 cattle not tested for brucellosis and not accompanied by a certificate should be granted where respondent's answer did not deny the allegations in the complaint and respondent's mitigating circumstances were unpersuasive. Ignorance of the law is not a mitigating circumstance in imposing civil penalties involving violations of the Brucellosis Eradication Program

Questions Certified by *William J Weber, Administrative Law Judge.*

Ruling and order by Donald A. Campbell, Judicial Officer.

RULING ON CERTIFIED QUESTIONS

On August 28, 1984, Administrative Law Judge William J. Weber certified to the Judicial Officer the question as to whether complainant's motion for adoption of a proposed Decision and Order should be granted and, if not, what issues remain open under the pleadings?

This action was instituted by a complaint filed on April 16, 1984, alleging that (i) respondent moved interstate 13 cattle that were not tested for brucellosis, and (ii) the cattle were not accompanied by a certificate, in violation of 9 C.F.R. § 78.9(b).

In response, respondent filed a letter, which is accepted as an answer. However, respondent's answer does not deny the allegations in the complaint, and alleged mitigating circumstances are unpersuasive for the reasons set forth in the proposed Decision and Order.

Assuming, without deciding, that there is any basis for believing that respondent was unaware of the requirements of the regulations, ignorance of the law is not a mitigating circumstance in determining the civil penalty to be imposed for violations of the Brucellosis Eradication Program. Under the Animal Quarantine and Related Laws, as amended, one who "knowingly" violates the regulations is subject to a fine not to exceed $5,000 or imprisonment for not more than one year, or both. 21 U.S.C. § 122. However, the word "knowingly" is omitted in the same section of the statute authorizing the Secretary to impose a civil penalty of not more than $1,000 for a violation of the regulations. *Ibid.*

For many years the Federal Government has maintained a vigorous and costly program directed to the control and eradication of brucellosis, which is a contagious, infectious and communicable disease affecting livestock and transmittable to humans. Because of the large economic impact of the cattle industry on the Nation, the success of the Brucellosis Eradication Program is of national importance. It would significantly undermine the program if ignorance of the law were con-

sidered as a mitigating circumstance in determining the amount of civil penalties to be imposed for violations of the program.

Respondent has made no claim that the cattle involved in this proceeding were (i) not subject to testing because they were, *e.g.*, "non-vaccinates under 18 months of age" (see 9 C.F.R. § 78.9(b)) or they originated in "Certified Brucellosis-Free Herds" (see 9 C.F.R. § 78.9(b)(3)(i)), (ii) not required to have a certificate because they were "moved directly from a farm of origin to a specifically approved stockyard" (see 9 C F.R. § 78.9(b)(3)(iii)), or (iii) not subject to testing or a certificate because they were moved interstate "in the course of normal ranching operations without change of ownership and to another premises belonging to the same owner" (see 9 C.F.R. § 78.9(b)(3)(iv)). Since respondent should have raised these defenses, if they were applicable, it would be inappropriate to delay issuance of the proposed Decision and Order until further briefs are filed. But if any of these defenses are relevant, respondent may raise the issue in a petition to reconsider the Decision and Order.

For the foregoing reasons, the following order should be issued.

Order

Complainant's motion for adoption of a proposed Decision and Order should be granted and the proposed Decision and Order should be entered.

ERRATUM

In Agriculture Decisions, Volume 43, Number 3 (May--June 1984), beginning at the top of page 748 (43 A.D. 748) the heading portion of the decision as printed therein is incorrect. The heading should read as follows:

. . . . .

In re: SIMON VEJAR SANCHEZ. A.Q. Docket No. 18. Ruling filed May 24, 1984.

Failure to file an answer within prescribed time leads to a default decision—Civil penalty imposed by another governmental agency does not prevent this department from imposing a civil penalty for violation of the Animal Quarantine laws—The civil penalty previously imposed should be taken into consideration in determining the sanction in the Department's proceeding.

The Judicial Officer ruled on questions certified by Judge Palmer that a civil penalty of $5,190 imposed under the customs laws does not prevent this Department from imposing a civil penalty relating to the same transaction for violation of the animal quarantine laws. However, the fact that a civil penalty has been imposed on respondent by another governmental agency should be taken into consideration in determining the sanction in this proceeding. Failure to file an answer within the time

provided is deemed an admission of the allegations in the complaint leading to a default decision, which is seldom set aside.

Questions certified by *Victor W. Palmer, Administrative Law Judge.*

Ruling by Donald A. Campbell, Judicial Officer.

RULING ON CERTIFIED QUESTIONS

. . . . . .

The balance of the decision as printed in 43 Agri. Dec. at 748 is correct. — Editor.

In re: KING LIVESTOCK COMPANY, INC., NORTHWEST ALABAMA LIVESTOCK AUCTION, CARL "DICKIE" GUIER, and TRENTON GRAIN COMPANY. A.Q. Docket No. 197. Order filed January 5, 1987.

Order issued by Victor W. Palmer, Administrative Law Judge.

ORDER OF DISMISSAL

Upon consideration of request of complainant and for good cause shown, the complaint herein is dismissed with prejudice against respondent, Carl "Dickie" Guier.

In re: PORT CITY STOCKYARDS CO., INC., JAMES A. SARTWELLE, JOHN JOYCE, and RICHARD WAGNER. A. Q. Docket No. 290. Order filed January 28, 1987.

Order issued by Edward H. McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

For good cause shown in complainant's motion, filed January 21, 1987, the complaint in this matter is dismissed. IT IS ORDERED, that the complaint issued in this matter by the Administrator, Animal and Plant Health Inspection Service on August 27, 1986, be and hereby is, dismissed with prejudice.

In re: APEX MEAT COMPANY. FMIA Docket No. 78. Ruling filed August 14, 1984.

Should administrative proceeding to withdraw meat inspection be stayed pending appeal of criminal conviction—Public interest requires prompt hearing.

Judicial Officer ruled in response to a question certified by Judge Weber that the administrative proceeding to withdraw meat inspection because of the conviction of respondent's president of 22 felonies involving wire fraud should not be stayed pending an appeal of the criminal conviction. Respondent's criminal appeal raises a substantial question and respondent will be unable to recover the money spent in this proceeding irrespective of the outcome of the criminal appeal, but the public interest requires a prompt hearing since the criminal conviction raises a sufficient question as to whether respondent is fit to receive inspection. Withdrawal of inspection based on a felony conviction is only to protect the public health—not to punish or to deter others. It is not the Department's function to retry the felony case.

Question certified by *William J. Weber, Administrative Law Judge.*

Ruling and order by Donald A. Campbell, Judicial Officer.

RULING ON CERTIFIED QUESTION

On July 9, 1984, Administrative Law Judge William J. Weber certified to the Judicial Officer the question as to whether respondent's motion to stay the administrative proceeding in this case pending Mr. Magidow's appeal of his conviction for wire-fraud felonies to the United States Court of Appeals for the Ninth Circuit should be granted.

This action was instituted by a complaint filed on March 13, 1984, alleging that respondent is unfit to engage in any business requiring inspection under the Federal Meat Inspection Act because Aaron Magidow, respondent's president, was convicted, in the United States District Court for the Central District of California of 22 "felonies involving wire fraud in violation of 18 U.S.C. § 1343, for his participation in a series of schemes involving fraudulent meat purchasing practices" (Complaint, ¶ II).

It is provided in § 401 of the Federal Meat Inspection Act, added by amendatory legislation in 1967 (21 U.S.C. § 671):

> *The Secretary may* (for such period, or indefinitely, as he deems necessary *to effectuate the purposes of this chapter*) refuse to provide, or *withdraw, inspection service* under subchapter I of this chapter with respect to any establishment *if he determines*, after opportunity for a hearing is accorded to the applicant for, or recipient of, such service, *that such* applicant or *recipient is unfit* to engage in any business requiring inspection under subchapter I *because* the applicant or recipient, or *anyone responsibly connected with the* applicant or *recipient, has been convicted*, in any Federal or State court *of* (1) *any felony*, or (2) more than one violation of any law, other than a felony, based upon the acquiring, handling, or distributing of unwholesome, mislabeled, or deceptively packaged food or upon fraud in connection with transactions in food. (Emphasis added.)

Respondent seeks a stay of this administrative proceeding until the United States Court of Appeals rules on Mr. Magidow's appeal, contending that a stay poses no threat to the public health or safety since there is no allegation that respondent will produce adulterated, unwholesome, or misbranded meat-food products; a stay will prevent the needless waste of administrative resources since the Ninth Circuit's opinion will either result in the dismissal of this action or in the simplification of the hearing; it would be unduly burdensome to respondent to proceed in both the appeal and at the administrative proceeding; respondent will not be able to obtain adequate compensation or other corrective relief for the expenditures incident to this proceeding, an administrative order withdrawing inspection service entered prior to the Ninth Circuit's opinion in the criminal case would result in irreparable harm which could only be avoided by taking appeals from this administrative proceeding; and that the need to deter others does not justify proceeding during the pendency of the appeal.

The criteria for determining whether to stay an administrative order, to grant a preliminary injunction, or to stay a district court order pending appeal, which, by analogy, are relevant here, are set forth in *Virginia Petroleum Job. Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958), as follows:

> Essentially, four factors influence our decision: (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. But injury held insufficient to justify a stay in one case may well be insufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits. (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? On this side of the coin, we must determine whether, despite showings of probable success and irreparable injury on the part of petitioner, the issuance of a stay would have a serious adverse effect on other interested persons. Relief saving one claimant from irreparable injury, at the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents. (4) Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes.

Where the latter three criteria strongly favor a stay, it is not necessary for the party seeking a stay to show "that is likely to prevail on the merits of its appeal," as stated above, but only that the party seeking a stay has made a substantial case on the merits of the appeal or has raised serious questions on appeal. *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843-44 (D.C. Cir. 1977).

In the present case, the record of the criminal proceeding is not before me, and even if it were, some of respondent's arguments probably could not be determined upon the basis of the record (*e.g.*, respondent's contention that the prosecutors failed to turn over exculpatory evidence to defendants and induced a person with favorable and exculpatory evidence concerning Mr. Magidow not to testify). Nonetheless, from the briefs filed, it would seem that respondent's appeal raises serious questions meeting *Virginia Petroleum's* first criterion, as modified in *Washington Metropolitan Area Transit Comm'n*.

Respondent also meets the second criterion, *viz.*, irreparable injury. Here, unlike the situation in *Virginia Petroleum*, adequate compensatory or other corrective relief would not be available to respondent at a later date.

First, as to respondent's extensive legal fees that will be incurred in this administrative proceeding, if respondent prevails here because the felony convictions are reversed on appeal, it is not likely that the Government's position would be regarded as so unreasonable in law or fact that an award of fees and expenses would be made to respondent. See Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, Agricultural Law, § 3.24(A) (August 1983 Cumulative Supplement).

Furthermore, if inspection services were withdrawn from respondent, and complainant subsequently withdrew its contention that respondent is unfit to receive inspection services (because of the Ninth Circuit's

opinion in the criminal proceeding),[1] respondent would have suffered irreparable damage. In this latter respect, however, it is not likely that a final administrative decision would be issued prior to the decision of the Ninth Circuit in the criminal proceeding.

Notwithstanding the foregoing considerations, I believe that the public interest requires that this proceeding continue without delay.

The public interest involved in the meat inspection program was set forth in a congressional statement of findings enacted in 1967 together with the provisions involved here for the withdrawal of inspection service based upon a felony conviction, as follows (21 U.S.C. § 602):

> *§ 602. Congressional statement of findings*
>
> Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers

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[1] Complainant apparently concedes that if Mr. Magidow's felony conviction is reversed on appeal, *e.g.*, because of a lack of evidence, there will be no basis for withdrawing inspection from respondent. In the order permitting the filing of briefs, the Judicial Officer specifically asked (Order, at 2):

> Does complainant contend that the Department has the right to withdraw inspection from respondent even if Mr Magidow's conviction is reversed on appeal, *e.g.*, because of insufficient evidence, before the final order is issued by the Judicial Officer in this proceeding? In this respect, is there a difference between the statute involved in the *Exxon* case, which permits termination of a franchise agreement upon the "conviction of the franchisee of any felony involving moral turpitude" (716 F.2d at 1398), and the Meat Inspection Act, under which the "felony must be of such nature as to support a finding that the recipient is 'unfit to engage in any business requiring inspection' as a result of that felony (21 U.S.C. 671)." *In re Norwich Beef Co.*, 38 Agric Dec. 380, 394 (1979), *aff'd*, No. H79-210 (D. Conn. Feb 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan 22, 1982)?

In its brief pursuant to the Judicial Officer's order, complainant states (Brief, at 7):

> Complainant does not contend that it might proceed against respondent were the conviction overturned. The Secretary wishes no undue enhancement of power. However, seeking to use power not possessed is a far cry from attempting to exercise statutorily granted jurisdiction.

> and the public generally. It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce, and that regulation by the Secretary and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.

The "sole purpose" for a proceeding under § 401 (21 U.S.C. § 671) to withdraw meat inspection because of a felony conviction is to protect the public interest by preventing contaminated, unwholesome, or improperly marked, labeled or packaged meat products from being marketed. Such a proceeding is not to deter others from violating the law As stated in *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 391-92, 399 (1979), *aff'd*, No. H79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982):

> The concern of the Congress was the establishment of a new system for federal and state inspections of processing plants to prevent contaminated, *** unwholesome [or improperly marked, labeled or packaged] [2] food being put on the market to the detriment of the consuming public. As a consequence, we are constrained to read § 671 as an added provision to assist in achieving the particular Congressional objective and for no other purpose.
>
> There is no contention in this proceeding that Alan Roessler is not a person responsibly connected with Norwich Beef Co., Inc., the respondent herein. Nor is there any contention that Alan Roessler was not convicted of a felony in State Court, or of a misdemeanor in Federal Court. Nor is there any contention that Alan Roessler is not competent to process wholesome meat products. These facts are admitted and established. The principal and sole contention is whether such convictions of Alan Roessler *require*, or *warrant*, the withdrawal or refusal of Federal inspection services by the Secretary for the sole purpose of preventing contaminated, *** unwholesome,[or improperly marked, labeled or packaged] [3] meat products from being marketed.
>
> * * * *
>
> However, the severe sanction in this case is not for the purpose of deterring others, but to protect the public interest by assuring that consumers receive meat and meat food products that are wholesome, not adulterated, and properly marked, labeled and packaged.

Similarly, in *In re Wyszynski Provision Co.*, 40 Agric. Dec. 17, 26 (1981), *aff'd*, 538 F. Supp. 361 (E.D. Pa. 1982), it is stated:

> Respondent also contends that it has been punished enough by its criminal fines and the adverse publicity resulting from the criminal convictions. However, when Congress set forth the additional administrative remedy involved in the present proceed-

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[2] Bracketed material appears in the original.

[3] Bracketed material appears in the original.

> ing [withdrawal of inspection] based upon a felony conviction, Congress knew, of course, that punishment would customarily flow from a felony conviction. Congress nonetheless provided for this additional remedy to protect the public health. This administrative proceeding is not to punish respondent but is to protect the public health.

The statutory grant of authority to the Secretary to withdraw meat inspection for a felony conviction is expressly limited to a withdrawal for "such period, or indefinitely, *as he deems necessary to effectuate the purposes of this Act* [*i.e.*, the Federal Meat Inspection Act, as amended]" (emphasis added; 81 Stat. 584, 597 (1967), codified in 21 U.S.C. § 671). And the statutory grant of authority is limited to cases where the felony is of such nature as to support a finding that the recipient of inspection services is unfit to engage in any business requiring inspection as a result of the felony conviction. As stated in *Norwich Beef, supra*, 38 Agric. Dec. at 394–96:

> However, inspection services are not to be withdrawn automatically because of the conviction of a felony. The felony must be of such nature as to support a finding that the recipient is "unfit to engage in any business requiring inspection" as a result of that felony (21 U.S.C. 671).
>
> Dr. Hatter explained that meat inspectors cannot continuously observe all of the processing activities at a plant and, therefore, the inspection service must be able to depend upon the reliability and integrity of the plant management to be assured that the health and welfare of consumers will be protected. Such reliability and integrity are lacking here. Specifically, he testified (Tr. 23, 39–43):
>
> > Q. Is there anything specifically about the way the meat inspection system works and the way the business works that creates a need for this type of integrity that you are talking about?
> >
> > A. Yes, because in this role we do not have and cannot have enough inspectors observing every operation that is going on, on a daily basis. We have inspectors that cover the sausage formulation, for example, where you have in one section the receiving cooler of fresh meats, then you have the formulation, you have the spice room, which is all taking place, and then emulsion and stuffers. These are all taking place simultaneously so, therefore, we have to have the reliability, the integrity of the plant management to be assured that when the inspector is not there to observe the actual procedure, that it will be carried out according to the rules and regulations.
> >
> > * * *
> >
> > Q. Dr. Hatter, the evaluation of these applications which come into your office, would an indication in response to these Blocks 19 and 20, that an individual associated with the organization was -- would an indication that such an individual have been convicted of a crime of larceny who was associated with the organization cause

any particular concern on your part concerning the integrity of that facility and that operator?

A. Yes, because the integrity, honesty and dependability of the applicants, including the operation of the plant itself, is solely dependent upon the individuals within that plant to abide by the rules and regulations of when and when not the inspector might be on the premises, so that the matter of records, the formulation, the restricted ingredients going [into] each product would be carried out depending upon the integrity of plant management.

* * *

Q. If, on the same application, you were informed that an individual connected with the applicant had been convicted of the crime of selling and transporting meat under grant of inspection obtained through false representations, would this cause you any particular concern?

A. Yes, it would because of what I had mentioned previously, the dependability that we rely on plant management to carry out all the rules and regulations as far as their operations, both in sanitation and in their preparation of meat and meat food products, and unless we have this, we cannot depend on it, and this certainly would indicate that it was in doubt as far as the larceny type of situation.

* * *

Q. Now, Doctor Hatter, based on your familiarity with these documents, your understanding of the purpose of Section 401 of the Meat Inspection Act and your own experience and responsibilities within the Meat and Poultry Inspection Programs, have you formed an opinion as to whether the Respondent in this action should be allowed to continue to obtain the benefit of meat inspection services?

A. Yes, I do.

* * *

Q. And what is that opinion, Doctor?

A. That based on the evidence that we have before us, that the Norwich Beef Company as an operator under Federal inspection, puts the total program into jeopardy in that the consumer, who we service or protect as far as the final product reaching their table, loses confidence in the reliability when we permit the type of operation to be operated by the individuals who have been so convicted of a felony and a misdemeanor in this case.

Q. When you talk about integrity, do you feel that because of these convictions, sir, that your program can place any reliability on Norwich Beef Company?

A. No, especially since the application was falsely made out, without giving us proper documentation. Certainly, we don't have the reliability or the integrity needed as far as the plant's operation.

> Q. Doctor Hatter, is there any action which the Respondent in this action might take which, in your opinion, would allow them to continue to receive Federal inspection services?
>
> * * *
>
> A. Yes. Norwich Beef could continue if Mr. Alan Roessler, who was convicted of the felony and the misdemeanor, would remove himself from the stockholders plus any contact with the operation of Norwich Beef Company, and that Norwich Beef would be on probation for a period of time.

The Federal inspector who inspects meat products at respondent's plant is at the plant only about 80% of the time since he inspects at two other plants besides respondent (Tr. 45). Also, even when he is at respondent's plant, he cannot watch all operations at the same time. Hence unless the inspection service can depend upon the reliability and integrity of respondent's management, it cannot protect the "public interest * * * by assuring that meat and meat food products distributed to them [from respondent's plant] are wholesome, not adulterated, and properly marked, labeled, and packaged" (21 U.S.C. 602).

The convictions of Alan Roessler provide a reasonable basis for the view of the administrative officials that they cannot depend upon the reliability or integrity of respondent so long as Alan Roessler is associated with the firm.

Alan Roessler has been convicted of two crimes relating to the profitability of meatpacking companies. I infer that the first crime was committed with the expectation of profit, and that restitution was later made to lessen the criminal penalty. The second crime obviously involved the profitability of respondent's meatpacking business since it was committed to obtain inspection, which is indispensable to the operation of respondent's plant

Although only the felony conviction affords a jurisdictional basis for withdrawing inspection services from respondent, once the jurisdictional basis is met consideration can be given to any other relevant circumstances, favorable and unfavorable.

Since it "is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged" (21 U.S.C. § 602), the alleged conviction of respondent's president "of twenty two felonies involving wire fraud in violation of 18 U.S.C. § 1343, for his participation in a series of schemes involving fraudulent meat purchasing practices" (*Complaint*, ¶ II), raises a sufficient question as to whether respondent is fit to receive inspection services so that the public interest requires this proceeding to proceed as promptly as possible.

Respondent argues that at "both the June 1st and June 8th prehearing conferences, Complainant's attorneys acknowledged that there is no threat to the public health" (*Brief, at 5* n.2). Assuming that this is

true, the concessions were based on a failure to understand the fundamental nature of a proceeding to withdraw inspection under § 401 of the Act, *i.e.*, they were based on an error of law which is not binding on the Department. As shown above, unless a felony conviction causes the Secretary to believe that the public health is endangered by providing inspection to a convicted felon's plant, there is no basis for instituting an action to withdraw inspection service from the plant because of a felony conviction. If there were no threat to the public health, the action should not be stayed--it should be dismissed!

Respondent relies on a number of cases setting forth the criteria for emergency action by an administrative agency in suspending a license or issuing a rule without holding a hearing because of the public interest requiring immediate action. However, those cases are not in point since complainant does not seek to withdraw inspection here without holding a hearing.

On the other hand, complainant relies on various "public concerns" which, I believe, are irrelevant in this proceeding under the Federal Meat Inspection Act. Complainant states (Brief, at 10):

> Where lies the public interest in the instant case? There are two actual public concerns presented. First the public has an interest in the efficient administration of justice. Second the public has an interest that convicted felons not be allowed to continue to make profits during years of appeal from the very firms used to bilk their fellow citizens.

Complainant's first concern is ambiguous. If "efficient" is used in the sense of the "least wasteful means of doing a task or accomplishing a purpose" (Webster's Third New International Dictionary, Unabridged, at 725 (1981)), the present proceeding will be the most wasteful means of doing the task if an administrative hearing is held in this proceeding, which is then nullified or impaired by a court of appeals decision wholly or partially in Mr. Magidow's favor in the criminal proceeding.

If, however, "efficient" is used in the sense of facilitating "the serving of a purpose" (*ibid.*), the Secretary's only concern under the Meat Inspection Act is to prevent contaminated, unwholesome, or improperly marked, labeled or packaged meat products from being marketed. *In re Norwich Beef Co., supra.* Specifically, it is no concern of the Secretary of Agriculture under the Federal Meat Inspection Act to prevent convicted felons from continuing to make profits during years of appeal from the firms used to bilk their fellow citizens. Similarly, it is no concern of the Secretary in this type of proceeding to deter other packers from committing similar violations. The Federal Meat Inspection Act does not prohibit bilking citizens by wire fraud. It is only if felony convictions for wire fraud cause the Secretary to believe that his meat inspection staff cannot assure that contaminated, unwholesome, or improperly marked, labeled or packaged meat products will not be

marketed from a plant that the Secretary has any concern under the Federal Meat Inspection Act about wire-fraud felonies.

Respondent cites *In re Utica Packing Co.*, 39 Agric. Dec. 590, 603 (1980), *aff'd*, 511 F. Supp. 655 (E.D. Mich. Apr. 14, 1981), *remanded*, 705 F.2d 460 (6th Cir. 1982), *decision on remand*, 44 Agric. Dec. 2724 (Nov. 18, 1982), *final decision on reconsideration*, 43 Agric. Dec. 373 (Mar. 20, 1984), *appeal docketed*, No. 80-72742 (E.D. Mich. Apr. 6, 1984), for the proposition that respondent intends to probe every fact underlying the conviction, as is its right.

Although under the *Utica* doctrine, as modified by the court of appeals, all mitigating circumstances must be considered, it is not the Department's function to retry the felony case. As stated in *Utica*, 39 Agric. Dec. at 602:

> It is not my function to reweigh the evidence leading to the felony conviction. The Act does not indicate that a recipient may be found unfit to receive inspection service because a person has committed certain acts. Rather, the Act indicates that some recipients will be determined to be unfit because a responsibly connected person "has been convicted" of a felony. Accordingly, respondent's arguments based on the circumstances of his conviction are not relevant here Respondent's president and half-owner was convicted in a criminal proceeding tried without a jury in which the judge applied a standard of proof greater than the standard of proof that would be applicable in an administrative proceeding. There is no basis under the plain terms of the statute for a redetermination in this proceeding as to whether the felony conviction was warranted.

For the foregoing reason, the following order should be issued

Order

Respondent's Motion to Stay should be denied. This proceeding is remanded to the Administrative Law Judge for further proceedings.

In re: APEX MEAT COMPANY, INC. FMIA Docket No. 78. Decision filed January 28, 1987.

Conditional lifting of previous stay order—Right to withdraw motions filed with Hearing Clerk—Judicial Officer's position granting motions to vacate stay orders.

Complainant filed a document purporting to withdraw its motions to lift the stay order previously imposed, but a party does not have the right to withdraw a motion filed with the Hearing Clerk In accordance with the Department's prior policy, under which an individual who is convicted of a felony that makes his meat plant unfit to receive inspection is given 90 days to become disassociated from the plant and one year in which to sell his stock, in which event meat inspection is not withdrawn from the plant, the stay order in this case is conditionally lifted to accomplish that purpose.

Harold Reuben and *Joseph Pembroke*, for complainant.
Philip Olsson, Washington, D.C., for respondent.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER CONDITIONALLY LIFTING STAY ORDER

On September 24, 1986, complainant filed a motion to vacate the stay order previously issued in this case by the Judicial Officer. On October 1, 1986, oral argument was heard before the Judicial Officer on this motion. The Judicial Officer, complainant and respondent each filed proposed orders for discussion at the oral argument. On October 29, 1986, complainant filed a second motion to vacate the stay order following the Supreme Court's denial of review of the decision of the United States Court of Appeals for the Ninth Circuit which affirmed Aaron Magidow's criminal convictions. On November 14, 1986, respondent moved that the stay order be lifted, with provisions to permit Aaron Magidow to have 90 days within which to become disassociated from respondent and 1 year in which to dispose of his stock. The Judicial Officer has not yet ruled on any of the motions.

On January 21, 1987, complainant filed a notice purporting to withdraw his motions to vacate the stay order. Complainant's notice states in its entirety:

> On September 5, 1985, the Judicial Officer issued a Decision and Order indefinitely withdrawing inspection service under Title I of the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*) from respondent, its officers, directors, affiliates, successors and assigns, directly or through any corporate or other device. The Judicial Officer stayed his order pending the completion of Aaron Magidow's appeal of the criminal convictions that gave rise to this proceeding and respondent's appeal to the Federal court from the Judicial Officer's Decision and Order withdrawing inspection services.
>
> On February 4, 1986, the United States Court of Appeals for the Ninth Circuit affirmed the criminal convictions. On September 19, 1986, the United States District Court for the District of Columbia affirmed the Judicial Officer's Decision and Order.
>
> The District Court affirmed the Decision and Order after conducting an oral hearing on August 29, 1986, on respondent's motion for a stay of the appellate proceedings. The District Court held further oral hearings on September 9 and 12, 1986, to review the merits of the case. During the course of those hearings, the Court said:
>
> > "I think this is a very serious matter. You have a man who is convicted, you have a person who is going to go to jail soon, so I assume, and there is going to be nobody running this company, and I don't see anything wrong in taking away the sanction -- I mean taking away the license, withdrawing the license.
> >
> > He has lived a charmed life, and there is no great constitutional right to be able to sell people meat

where a person has been, has acted in the flagrant way he has acted over the years." See page 29 of Transcript of Oral Hearing on September 9, 1986.

On September 24, 1986, respondent appealed the District Court Decision to the United States Court of Appeals for the District of Columbia. On November 28, 1986, a motion for summary affirmance was filed by the Government, and the matter has been briefed by both parties.

On September 24, 1986, complainant filed a motion to vacate the stay order previously issued in this case by the Judicial Officer. On October 1, 1986, oral arguments were presented by counsel for complainant and respondent to the Judicial Officer. No ruling on that motion has been issued by the Judicial Officer as of this time.

On October 29, 1986, complainant filed a second motion to vacate the stay order following the Supreme Court's denial of review of the decision of the United States Court of Appeals for the Ninth Circuit which affirmed Aaron Magidow's criminal convictions. No ruling on that motion has been issued by the Judicial Officer as of this time.

As complainant argued at the oral arguments before the Judicial Officer on October 1, 1986, the immediate implementation of the order withdrawing inspection from respondent is totally warranted on the basis of the record in this proceeding. The respondent and Aaron Magidow, the owner and operator of respondent, were previously convicted and sentenced for the flagrant felonies of bribing a USDA meat inspector and USDA meat graders. Mr. Magidow served a prison term for those offenses, and subsequently, he was again convicted and sentenced to prison for felonies involving fraudulent meat purchasing practices. The latter conviction has been upheld by the Supreme Court, and we understand that Mr. Magidow will soon begin serving his prison sentence. The Department has never sought to remove meat or poultry inspection from an applicant or recipient of those services under circumstances as egregious as those which exist in this case. The public interest clearly mandates the order in this matter withdrawing inspection from respondent.

The Decision and Order of the Judicial Officer in this matter is now pending on appeal to the United States Court of Appeals for the District of Columbia, and the Government is seeking an expedited decision. The Judicial Officer has indicated a reluctance to grant complainant's motions to vacate his stay order while that appeal is pending.

Complainant has concluded that no useful purpose is served by further consideration of its motions by the Judicial Officer. Accordingly, complainant withdraws those motions by filing of this notice. There is therefore no justiciable issue before the Judicial Officer for further action or determination.

A party does not have the right to withdraw a motion filed with the Hearing Clerk. The Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary provide (7 C.F.R. § 1.143; emphasis added):

§ 1.143 *Motions and requests.*

(a) *General.* All motions and requests shall be filed with the Hearing Clerk, and served upon all the parties, except (1) requests for extensions of time pursuant to § 1.147, (2) requests for subpoenas pursuant to § 1.149, and (3) motions and requests made on the record during the oral hearing. The Judge shall rule upon all motions and requests filed or made prior to the filing of an appeal of the Judge's decision pursuant to § 1.145, except motions directly relating to the appeal. Thereafter, the Judicial Officer *will* rule on any motions and requests, as well as the motions directly relating to the appeal.

The rules of practice do not state that the "Judicial Officer will rule on any motions and requests unless they are withdrawn by the moving party." The rules merely state that the Judicial Officer "will" rule on any motions and requests. Hence complainant lacks power to withdraw the motions as a matter of right. This is consonant with the Department's position that an appeal to the Judicial Officer cannot be withdrawn as a matter of right. *In re Waller*, 34 Agric. Dec. 373, 374 (1975) (order permitting withdrawal of appeal); *In re Shatkin*, 34 Agric. Dec. 296, 297 (1975) (order permitting withdrawal of appeal). In addition, respondent's motion to lift the stay is still pending before the Judicial Officer.

Since complainant's notice falsely states the position of the Judicial Officer as to this matter, it is appropriate to set forth the views previously expressed by the Judicial Officer as to this matter.

Complainant's notice states that the "Judicial Officer has indicated a reluctance to grant complainant's motions to vacate his stay order while that appeal [by respondent to the United States Court of Appeals] is pending." That is totally false! The Judicial Officer has never indicated a reluctance to grant complainant's motions to vacate his stay order while respondent's appeal to the court of appeals is pending, as complainant's attorneys should well know. Both attorneys who signed complainant's present notice attended the oral argument before the Judicial Officer on October 1, 1986. Nothing said by the Judicial Officer at the oral argument could remotely be construed as indicating a reluctance to grant complainant's motions to vacate the stay order while respondent's appeal is pending before the United States Court of Appeals.

In the Judicial Officer's tentative views filed September 25, 1986, just prior to the October 1, 1986, oral argument, the Judicial Officer made it clear that respondent's appeal to the court of appeals was not of any consequence in considering complainant's motion to lift the stay. He stated (Tentative Draft at 2–3):

> Another factor to be considered is whether there is a reasonable likelihood or possibility that respondent will prevail on the merits. The court of appeals has affirmed the criminal conviction of Aaron Magidow, and, as recognized by respon-

dent's attorney, "the petition for certiorari is a long shot" (Transcript of proceeding before the District Court on September 9, 1986, at 31).

In addition, I do not believe that there is any reasonable possibility that respondent will ultimately prevail if respondent appeals from the order of the district court affirming the administrative decision and order issued herein. There is no novel issue involved in this case. The administrative decision here is consistent with numerous other decisions withdrawing meat inspection indefinitely (unless a convicted individual disassociates himself from the plant).

. . . .

Considering all of the relevant circumstances in this case, I believe that the stay order should be lifted promptly. However, the Department customarily gives an officer or owner 90 days in which to disassociate himself from a plant and 1 year within which to sell his stock, in circumstances where he has been convicted of a felony that renders the plant unfit to receive inspection. A number of these cases are discussed in *In re Great American Veal Co.*, 45 Agric. Dec. ____ (Sept. 9, 1986), a copy of which is attached. No showing has been made by complainant as to why these customary time limits should not be followed here. Accordingly, the following order should be issued.

Moreover, the Judicial Officer dictated a summary of the first oral argument and distributed copies of the summary to counsels for both parties several days before a second oral argument informally scheduled to be held on January 23, 1987. The Judicial Officer purposely refrained from signing the summary or filing it with the Hearing Clerk since he did not want to embarrass complainant's counsels. However, now that complainant's counsels have falsely stated the Judicial Officer's position, the Judicial Officer feels constrained to set forth in its entirety the informal document distributed to both parties, which was intended to focus the issues at the second oral argument.

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	FMIA Docket No. 78
Apex Meat Company,	)	
Respondent	)	Informal (Tentative) Views
	)	(Not to be Filed with Hear-
	)	ing Clerk or Made Part of
	)	Official Record)

SUMMARY OF FIRST ORAL ARGUMENT

1. I explained that it is the policy of this Department, where an individual is convicted of a felony that makes the plant unfit to receive meat inspection, to give the convicted individual 90 days to become disassociated from the plant and 1 year in which to sell his stock.

2. I completely rejected complainant's argument that Aaron Magidow is worse than the other convicted individuals and, therefore, rejected complainant's argument that the 90-day and 1-year provisions should not apply here.

3. I explained that even though my order in Apex does not contain the 90-day and 1-year provisions, I intended the same result to be achieved through the stay provisions of the order, and pointed out that I said at the end of my decision that complainant was willing to provide inspection if Magidow becomes disassociated from the plant.

4. Counsel for both parties stated that they had previously arrived at a satisfactory agreement as to Magidow's disassociation from the plant but that it was rejected by the court. I stated that I would probably agree with any plan the parties agreed upon and stated that both parties should continue to negotiate and that I would not take any further action unless either party brought it to my attention that the other party was not negotiating in good faith.

SUBSEQUENT ACTIONS

1. Complainant filed documents asking for a lifting of the stay that were totally unrelated to anything I said at the oral argument, and which fly in the face of everything that I said during the oral argument.

2. Respondent's counsel has alleged that he volunteered to provide any information or assistance necessary to resolve the transfer of the business to a third party, but that complainant's counsel would not even discuss the matter. Complainant's counsel did not deny that allegation.

ADDITIONAL THOUGHT FOR CONSIDERATION

It is well settled that if an agency suddenly changes its policy, adversely affecting a private litigant, without giving any reason for this change of policy, the agency's action is arbitrary and capricious and will be set aside, or at least remanded to afford the agency an opportunity to explain the change in policy. If my order were to be construed as changing the 90-day and 1-year policy, the decision provides no explanation for the change of policy, and I know of no rational basis for such a change of policy. Accordingly, I believe my order would be invalid if interpreted as complainant would like it interpreted, *viz.*, as if it did not in effect provide for the 90-day and 1-year provisions, and I would expressly state that view if I were to grant complainant's motions.

If complainant's counsels completely missed the point as to everything said by the Judicial Officer at the oral argument on October 1, 1986, they should have understood the Judicial Officer's views when they read the Judicial Officer's informal summary set forth above. Evidently they did not! (Otherwise they would not have stated in their notice that the "Judicial Officer has indicated a reluctance to grant complainant's motions to vacate his stay order while that appeal is pending.")

Hopefully, after reading this order, complainant's counsels will understand that the Judicial Officer's reluctance to grant complainant's motions has nothing to do with respondent's appeal to the United States

Court of Appeals. His reluctance is based on the fact that he can see nothing to distinguish this case from other cases where a person who was convicted of felonies that rendered his meat plant unfit to receive inspection was, nonetheless, given 90 days within which to become disassociated from the plant, and 1 year within which to sell his stock.

During the oral argument on October 1, 1986, the Judicial Officer referred to *In re Great American Veal Co.*, 45 Agric. Dec. ____ (Sept. 9, 1986), *appeal docketed*, No. 86-3998 (D.N.J. Oct. 10, 1986), in which Mr. Burke, the plant's president and chief operating officer, was convicted of supplementing the salary of the veterinarian medical officer of USDA assigned to the plant, in connection with his official duties as the certified inspector. The 90-day and 1-year provisions are included in the *Great American Veal* order.

In addition, during the October 1, 1986, oral argument, the Judicial Officer referred to the discussion in *Great American Veal* of the following cases in which the 90-day and 1-year provisions are included in the orders (*Great American Veal*, slip op. at 29-30, 35-36, 42-43, 51-52):

2. Norwich Beef Company.

In *In re Norwich Beef Co.*, 38 Agric. Dec. 380 (1979), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982), *order modified*, 43 Agric. Dec. ____ (Nov. 15, 1984), the Judicial Officer withdrew inspection indefinitely from a packing plant, but suspended the sanction on condition that Alan Roessler was disassociated from the plant in 90 days and sold his stock within one year, and the plant did not commit designated offenses within 5 years.

Alan Roessler, respondent's president, treasurer and principal stockholder, had been convicted of the felony of receiving a truckload of hijacked beef and processing it through a packing plant which he managed (respondent's predecessor), with knowledge that it was stolen. Mr. Roessler was subsequently convicted of a misdemeanor because when he applied for Federal inspection for the newly established Norwich Beef Company, he answered "none" to questions with respect to whether he had previously been convicted of any crimes.

. . . .

3. Wyszynski Provision Company.

In *In re Wyszynski Provision Co.*, 40 Agric. Dec. 17 (1981), *aff'd*, 538 F. Supp. 361 (E.D. Pa. 1982), the Judicial Officer withdrew meat inspection service indefinitely from respondent, but suspended the withdrawal on the condition that Walter J. Wyszynski became disassociated from respondent within 90 days and sold his stock within one year, and respondent did not violate the Meat Inspection Act within 3 years.

The withdrawal of inspection service was based on the fact that Walter J. Wyszynski was convicted of three felony counts, and respondent of eight felony counts, all involving the sale of

adulterated meat. Sodium sulfite, a prohibited substance, had been surreptitiously added to sausage to make it appear fresher than it was.

. . . .

4. Toscony Provision Company.

In *In re Toscony Provision Co.*, 40 Agric. Dec. 533 (1981), *aff'd*, 538 F. Supp. 318 (D.N.J. 1982), *remanded by consent*, No. 82-5354 (3d Cir. Dec. 27, 1982), *decision on remand*, 43 Agric. Dec. ____ (May 18, 1984), *order denying late appeal*, 43 Agric. Dec. ____ (July 12, 1984), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished), the Judicial Officer withdrew meat inspection service indefinitely from respondent, but suspended the withdrawal on condition that Henry Dei became disassociated from respondent within 90 days and sold his stock within one year, and respondent did not violate the Meat Inspection Act within 2 years.

The withdrawal of inspection service was based on the fact that respondent and Henry Dei, its president and principal stockholder, were each convicted of a single felony, knowingly distributing adulterated meat food products, *viz.*, sausage to which an industrial chemical, imidazole, had been added. The chemical masks the aging or spoilage of the product, and, therefore, could cause harm if a retailer or consumer held the product too long because of its fresh appearance. The chemical was added without the knowledge of the meat inspector assigned to the plant.

. . . .

(a) Judicial Officer's Original Utica Decision.

In *In re Utica Packing Co.*, 39 Agric. Dec. 590 (1980), *aff'd*, 511 F. Supp. 655 (E.D. Mich. 1981), *remanded*, 705 F.2d 460 (6th Cir. 1982) (unpublished), *decision on remand*, 43 Agric. Dec. ____ (Nov. 18, 1982), *final decision on reconsideration*, 43 Agric. Dec. ____ (Mar. 20, 1984), *aff'd*, No. 80-72742 (E.D. Mich. Mar. 12, 1985), *reversed and remanded*, No. 85-1324 (6th Cir. Jan. 13, 1986), the Judicial Officer withdrew meat inspection service indefinitely from respondent, but suspended the withdrawal on the condition that David Fenster became disassociated from respondent within 90 days and sold his stock within one year.

The withdrawal of inspection was based on the fact that David Fenster, respondent's president and half owner, was convicted of four felonies under 18 U.S.C. § 201(b)9 for corruptly giving $200 on four separate occasions to Dr. Reed, the supervisor of five or six lay meat inspectors, who, together with Dr. Reed, inspected meat at respondent's plant. *United States* v. *Fenster*, 449 F. Supp. 435 (E.D. Mich. 1978). The felony convictions involved proof that the payments were made to influence inspection at the plant, i.e., to reduce the number of line-stoppages by the inspectors, and to give re-

spondent the benefit of the doubt with regard to hogs of questionable soundness.

Since the Department includes 90-day and 1-year provisions in its orders where the packing plant operator has been convicted of bribing the meat inspector assigned to the plant, or surreptitiously adding prohibited substances to meat, there seems to be no sound reason why the same 90-day and 1-year provisions should not be applied to Aaron Magidow, who was convicted of participating as an outlet (fence) for meat purchased by criminal associates on credit, with intent not to pay the suppliers (and previously of bribery that was settled by a consent order). (If complainant wants to establish a new policy under which 90-day and 1-year provisions will never be included in any orders, directly or indirectly, the Judicial Officer will be willing to consider complainant's arguments in that respect in some future case.)

Since complainant's counsels chose not to participate in a further oral argument with respect to this matter but, rather, chose to attempt to withdraw their motions, intending to preclude the Judicial Officer from conducting a further oral argument or issuing any further order with respect to this matter, it would seem that complainant has no additional arguments to advance with respect to the Judicial Officer's views

Considering all of the circumstances, the stay order previously issued should be lifted under conditions that afford Aaron Magidow the customary 90-day and 1-year periods in which to become disassociated from respondent and sell his stock, respectively.

A problem to be considered later is what type of order, if any, should be issued by the Judicial Officer if Aaron Magidow becomes (and remains) disassociated from respondent within 90 days and disposes of his stock within 1 year. The original order in this case withdraws inspection "indefinitely" from respondent and its "successors and assigns." The persons buying Aaron Magidow's stock would be "successors" or "assigns." Hence even if complainant approves a fit applicant to receive inspection at respondent's facility, inspection service would have to be withdrawn "indefinitely" from that applicant if the stay order is lifted. That undesirable consequence could, perhaps, be avoided if complainant limited the "indefinite" period of withdrawal of inspection to a single day on which the plant is closed. As stated in the original decision in this case (slip op. at 41):

> The withdrawal of inspection services from respondent indefinitely does not necessarily mean forever. For example, the record here indicates that the administrative officials would be willing to reinstate inspection service at respondent's plant if Aaron Magidow disassociates himself from the plant. In addition, they would be willing to consider, at a later date, whether Mr. Magidow's life and integrity had changed (Tr. 212-13, 254).

Order

The stay order previously issued in this proceeding is hereby lifted effective 90 days from the date of this order, *Provided, however*, That if by that date Aaron Magidow has completely disassociated himself from respondent's plant (except for stock ownership), and remains disassociated from respondent's plant, the stay order shall remain in effect until 1 year after the date of service of this order on respondent, and thereafter until further order of the Judicial Officer. Jurisdiction is hereby retained by the Judicial Officer indefinitely to issue further orders with respect to this matter. The parties shall keep the Judicial Officer advised as to the matters referred to herein.

COURT DECISIONS

ROBERT M. COOK, *et al*, Plaintiffs, *v.* HARTFORD ACCIDENT AND INDEMNITY COMPANY, Defendant. Civil No. 85-0-847. Memorandum Opinion filed January 23, 1987.

UNITED STATES DISTRICT COURT, DISTRICT OF NEBRASKA

Memorandum Opinion

Richard E. Robinson, Senior Judge.

THIS MATTER was tried to the Court on October 22, 1986. The parties have fully briefed the action and the matter is presently ripe for resolution. Jurisdiction is based on the Packers and Stockyards Act, 7 U.S.C. Section 209 (b), and 28 U.S.C. Section 1331. The following Memorandum embodies the Court's findings of fact and conclusions of law as mandated by Rule 52 (a), Fed.R.Civ.P.

The primary issue presented for resolution is whether the defendant Hartford Accident and Indemnity Company, as surety, is liable on a bond issued to E.K. Corrigan Company, its principal, for the unpaid purchase price of certain cattle purchases made by one Virgil P Miller, the action's main protagonist. Secondary issues involve whether prejudgment interest is available on any judgment and whether a trustee and/or attorney fee can be obtained. Each of these issues shall be addressed below.

The facts established at trial and in the record are as follows: E K. Corrigan Company conducts a livestock marketing and clearing agency business in Omaha, Nebraska. As required by the Packers and Stockyards Act, 7 U.S.C. Section 181 et seq., E.K. Corrigan maintained a bond covering its business transactions and the transactions of those clearing through E.K. Corrigan. *See* 9 C.F.R. 201.29. The Corrigan Bond, number 4154636, a copy of which is appended to this Memorandum, was issued by the defendant Hartford Accident and Indemnity Company, as surety, in the amount of $110,000.00 and remained effective through March 1, 1985. *See* exhibit 1. Registrants covered by the bond, *i.e.*, individuals clearing transactions through E.K. Corrigan, were listed on the bond and could be terminated therefrom pursuant to the provisions set out in section (j). *See* exhibit 1. E.K. Corrigan listed, and in the past had terminated, registrants on the bond. One of the registrants listed but never terminated prior to the bond's expiration was Virgil P. Miller.

As stated, E.K. Corrigan provided clearing services to various dealers and traders. According to Curtis R. Brown, president and majority shareholder of E.K. Corrigan, clearing services generally amounted to providing short term financing for the clearees. This clearing relationship worked as follows: a trader or dealer clearing through E.K. Cor-

rigan was provided drafts [1] from the E.K. Corrigan Company. When that trader or dealer purchased livestock to be cleared through E.K. Corrigan, he was authorized to sign and issue a Corrigan draft for the purchase price to the seller. This draft would then be honored by Corrigan and paid from its banking account. It was then understood between E.K. Corrigan, as clearor, and the trader or dealer, as clearee, that the clearee would resell the purchased livestock within a short period of time (frequently within twenty-four hours, sometimes within a week to ten days) and settle accounts with Corrigan. For its services, E.K. Corrigan received a commission of one dollar per head of livestock resold. Though it was established at trial that E.K. Corrigan only cleared transactions conducted with E.K. Corrigan drafts, [2] there was no caveat or restriction embossed on the bond itself indicating that E.K. Corrigan provided clearing services only to those utilizing Corrigan drafts. Rather, the bond's only ostensible limitations on Corrigan clearing services was providing services to those listed as clearees on the Corrigan bond.

Virgil P. Miller, lead protagonist but non-party in this action, was a registered cattle dealer/trader from Treynor, Iowa. For almost thirty years Miller was associated with E.K. Corrigan as a clearee. His name was listed on the Corrigan bond and was not expunged therefrom until the bond expired. Though associated with E.K. Corrigan, Miller was not a Corrigan employee; he was an independent trader and dealer who at times cleared his livestock purchases through Corrigan, and, at others, purchased solely on his own account. As a practice, when clearing through E.K. Corrigan Miller utilized the Corrigan drafts; otherwise he settled for his purchases with his personal check.

The three sales forming the basis claims of this action were transacted by Miller as follows: [3] a) On October 24, 1984, Dean Kinney sold twelve (12) heifers to Virgil Miller for a total purchase price of $5,222.48. On October 31, 1984, Dean Kinney sold sixty-two (62) steers and heifers to Virgil Miller for a total purchase price of $26,005.90. Miller has paid the sum of $7,028.38 to Dean Kinney and the balance of the purchase price due and owing for the livestock purchased on October 24, 1984, and October 31, 1984 is $24,200.00; b) On December 13, 1984, Willard Keply sold one hundred (100) steers

[1] For the purposes of this litigation, any dispute as to whether the instrument used in the clearing process was a check or a draft is of no significance.

[2] Virgil P. Miller testified that he had cleared purchases through E.K. Corrigan made with his personal check. Miller, however, was unable to recall or cite any specific time when this had happened. Therefore, the most credible evidence supports the defendant's assertion that E.K. Corrigan cleared only transactions conducted on its drafts.

[3] A fourth sale, which had been part of the original complaint, has since been settled.

and heifers to Virgil Miller for a total purchase price of $29,202.06. Miller issued his personal check for the purchase price, but the check was not paid due to insufficient funds in the checking account. The purchase price remains due and owing; c) On December 27, 1984, Dunlap Livestock Auction sold twenty-five (25) cows to Virgil Miller for a total purchase price of $8,975.45. Miller did not pay for the cows and the purchase price remains due and owing. In sum, the total claim of the unpaid sellers of livestock listed above is $62,377.51. See exhibits 4, 5, and 6.

All of the unpaid sellers listed above had previously dealt with and knew Miller as a clearee of E.K. Corrigan and all stated they relied on this relation in making the above-noted sales to Miller.[4] These sellers also acknowledge, however, that in previous dealings with Miller they had received Corrigan drafts not personal checks. They were never, on the other hand, informed or alerted to the alleged restriction that E.K. Corrigan cleared only transactions conducted with its drafts. The evidence demonstrated that at no time prior to these sales were the sellers advised by anyone that Miller no longer cleared his transactions through E.K. Corrigan. Miller himself did not notify the sellers of or allude to the alleged limitation when making these purchases. In fact, when Willard Keply received Miller's personal check for the December 13, 1984, cattle purchase he questioned Miller about the aberration to which Miller responded he had run out of Corrigan drafts.[5] Kepley accepted this explanation. Therefore, the unpaid sellers never had notice that, at the time of the unpaid sales, E.K. Corrigan no longer considered Miller a clearee. While it was established that the sellers did not contact E.K. Corrigan or the Packers and Stockyard Administration to find out whether Miller was still bonded prior to the unpaid sales, it is also apparent that the sellers, when dealing with Miller in the above sales, did so in good faith reliance that the purchases would be cleared through E.K. Corrigan Company.

Each of the unpaid sellers filed timely claims on the bond for payment and the plaintiff-trustee, Robert M. Cook, was duly appointed as trustee by Jack W. Brinkmeyer of the Packers and Stockyards Administration to represent these claimants. *See* exhibits 2, 3, 4, 5, 6, and 7.

There was a conflict in the evidence as to whether Virgil Miller was a clearee for E.K. Corrigan when the claimant sales were made in October and November of 1984. The defendant argues that Miller had

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[4] It appears all the sellers had regular dealings with Virgil Miller except for Dean Kinney who, prior to his October 24, and 31, 1984, sales had not dealt with Miller for several years

[5] Of the claims for unpaid sales, Willard Kepley is the only vendor who received a personal check from Virgil Miller. The other vendors never received a payment instrument of any kind. Each, however, testified to having previously received Corrigan drafts in their dealings with Miller.

been terminated as a clearee on August 6, 1984, when Corrigan president, Curtis R. Brown, refused to give Miller additional Corrigan drafts. Miller's outstanding accounts and backlog of cattle precipitated this action. The defendant argues that Corrigan drafts were essential to clearing transactions through E.K. Corrigan and since Miller no longer possessed the indispensable drafts he was no longer an E.K. Corrigan clearee. It is undisputed that after August 6, 1984, Miller did not, in fact, clear any transactions through E.K. Corrigan.

The plaintiff, on the other hand, argues Miller was a Corrigan clearee at the time of the unpaid sales. The Court finds this is the better legal position. The evidence clearly demonstrated that all pertinent times, *i.e.*, when the unpaid sales were consummated from October 24, through December 27, 1984, Virgil Miller was listed as a clearee on the E.K. Corrigan bond. In fact, Miller's name was not expunged from the bond at any time prior to its expiration on March 1, 1985. *See* exhibit 1. Additionally, Miller was listed as a trader on Bulletin No. 80 distributed on September 5, 1984, by the Omaha Live Stock Exchange. *See* exhibit 15. Bulletin No. 80, which ostensibly sanctioned Miller's clearing through E.K. Corrigan until November 30, 1984, was neither countermanded nor objected to by Corrigan, even though it clearly conflicted with Corrigan's own view that Miller was no longer a clearee. Finally, the bond itself, through section (j), set out procedures for terminating a registrant therefrom. That section provided "[t]ermination of the clearance of a registrant under condition clause 3 of this bond may be accomplished by issuance of a rider or endorsement by the Surety herein deducting the name of the clearee. Termination of the clearance shall become effective thirty (30) days after the date of receipt of the rider or endorsement by the administrator, Packers and Stockyard Administration, Washington, D.C." E.K. Corrigan neither followed this procedure nor notifed its surety, The Packers and Stockyard Administration, or the Omaha Livestock Exchange, that Miller was no longer a clearee at Corrigan's. E.K. Corrigan's first public notification of Miller's altered status came on January 11, 1985, well after the final sale at issue in this litigation. *See* exhibit 101. If Miller was terminated as a Corrigan clearee on August 6, 1984, (as the defendant contends) that fact was not a publicized one. All ostensible signs indicated Miller was an E.K. Corrigan clearee after August 6, 1984, and continued to be so until at least January 11, 1985. The defendant should not now be heard to complain on this account when the entity best suited and in the best position to notify others of Miller's altered

status, other than Miller himself,[8] was E.K. Corrigan, the defendant's principal; and yet that company failed to act. Oversight though it may have been, the defendant cannot now compel other innocent individuals (here the unpaid sellers) to shoulder the burden of its principal's failure to notify others that Miller was no longer a clearee. In conclusion, for the purposes of this litigation, the Court shall cast and treat Virgil Miller as an E.K. Corrigan clearee at the time of the claimant sales.

It is axiomatic that a surety is not liable on a bond unless its principal is also liable. Therefore, in order for the plaintiff to succeed in this action he must establish that E.K. Corrigan is liable for the purchases made by Virgil Miller. On the issue of liability the plaintiff advances a twofold argument. First he relies on the language of the bond itself in fixing E.K. Corrigan's, thus the defendant–surety's, liability. In particular, he makes reference to the following bond provisions:

> Applicable if others CLEAR through Principal
>
> (3) If the said Principal, acting as a clearing agency responsible for the financial obligations of other registrants engaged in buying livestock, viz.: (insert here the names of such other registrants as they appear in the application for registration), [registrants name here] or if such other registrants, shall (1) pay when due to the person or persons entitled thereto the purchase price of all livestock purchased by such other registrants for their own account (or) for the accounts of others and (2) safely keep and properly disburse all funds coming into the hands of such Principal or such other registrants for the purpose of paying for livestock purchased for the accounts of others, then this bond shall be null and void, otherwise to remain in full force and virtue, subject to the following terms, conditions and limitations:
>
> (i) The acts, omissions or failures of authorized agents or representatives of said Principal or persons whom said Principal shall knowingly permit to represent themselves as acting for said Principal shall be taken and construed to be the acts, omissions, or failures of said Principal and to be within the protection of this bond to the same extent and in the same manner as if they were the personal acts of said Principal.
>
> (j) Termination of the clearance of a registrant under condition clause 3 of this bond may be accomplished by issuance of a rider or endorsement by the Surety herein deducting the name of the clearee. Termination of the clearance shall become effective thirty (30) days after the date of receipt of the rider or endorsement by the Admin-

[8] At trial Miller testified that at the time of the sales he still considered himself to be a Corrigan clearee. In Miller's view Brown's refusal to give him additional Corrigan drafts would only last until he had brought his accounts to order, at which time he would obtain additional drafts. E.K. Corrigan's Curtis Brown refutes Miller's interpretation of his refusal to issue Miller additional drafts. One fact, however, is clear: after August 6, 1984, Miller did not clear any additional transactions through E.K. Corrigan.

istrator, Packers and Stockyards Administration, Washington, D.C.

The plaintiff asserts that these provisions fix the liability of E.K. Corrigan for the purchases Miller made as a clearee of E.K. Corrigan. In support of this argument the plaintiff leans heavily on the case of *United States Fidelity and Guaranty Company v. Quinn Brothers of Jackson, Inc.*, 384 F.2d 241 (5th Cir.1967).

Plaintiff's second argument turns on agency theory based on the long standing relation between E.K. Corrigan as clearor and Virgil Miller as clearee. He argues that through this relation, a relation known to each of the climant sellers, E.K. Corrigan cloaked Miller with a mantle of apparent authority to make the purchases at issue and bind E.K. Corrigan to the resultant financial obligations. The plaintiff argues that the sellers reasonably relied on this relation in making the claimant sales since none of them knew or had reason to know of the alleged termination of the clearing relation between E.K. Corrigan and Virgil Miller. It was the defendant's principal's (*i.e.*, E.K. Corrigan's) duty to notify others about the alleged termination; a duty not undertaken until all of the claimant sales had been made.

Finally, the plaintiff argues that the Court cannot infer that Miller, when making the claimant purchases, acted in contravention of the bond requirements of 9 C.F.R. Section 201.29(b) and, therefore, is assumed to have transacted the purchases as a Corrigan clearee. *See Hartford Accident and Indemnity Company v. Baldwin*, 262 F.2d 202, 206 (8th Cir.1958).

The defendant's basic theory is that the claimant sales did not fall within the scope of the bond; therefore, the defendant's principal–E.K. Corrigan, thus the defendant, is not liable on the bond. The defendant advances several reasons in support of this position. The defendant argues it was not responsible for all of the transactions engaged by Virgil Miller but rather was liable only for the ones cleared through E.K. Corrigan. After establishing this initial premise the defendant argues that the claimed unpaid sales were outside the scope of the bond for several reasons. First, Virgil Miller was no longer a E.K. Corrigan clearee at the time of the claimant sales due to Curtis Brown's refusal to advance Miller additional Corrigan drafts after August 6, 1984. Next, the E.K. Corrigan–Miller clearor–clearee relation was triggered only when Corrigan drafts were used in the purchasing transaction. In the claimant sales one seller received Miller's personal check, subsequently dishonored, and the other sellers received no payment instruments at all. This scenario, the defendant argues, did not result in a clearing transaction for which E.K. Corrigan could be held liable, therefore, the defendant as surety, likewise, cannot be held liable. It is the defendant's fundamental contention that the Miller purchases and transactions were entirely outside the scope of the Corrigan bond.

The defendant also argues that the transactions must have actually been cleared through E.K. Corrigan for it to be liable on the bond. In the instant action the defendant argues that the transactions were not actually cleared through Corrigan, therefore, the defendant is not liable on the Corrigan bond. The defendant further argues the Court cannot judicially enlarge a bond to encompass transactions not described or covered by the bond. This argument relies on Miller's status as both an independent dealer and an E.K. Corrigan clearee. The defendant contends Miller transacted the claimant purchases as an independent dealer for his own account not as a Corrigan clearee. Upon this view of the facts, the defendant then argues the transactions should be covered by a bond Miller was required to have for his independent dealings. The fact that Miller did not make a bond to cover his independent trading, and therefore, was violating Packers and Stockyard Act regulations, *see* 9 C.F.R. section 201.29(b), does not mean that the Corrigan bond can be judicially expanded to cover the said purchases.

The defendant next argues that state, rather than federal law, fixes the liability of the parties, and that the plaintiff has alleged no theory under state law upon which E.K. Corrigan, thus the defendant, can be held liable for the claimant transactions. The only possible state law theory, the defendant argues, upon which liability could be premised would be the agency theory of apparent authority.[7] The defendant argues the sellers did not rely on the fact that Miller was listed on the bond and cannot claim to have relied on an apparent authority theory because they (the sellers) did not make inquiries of either Miller, the Packers and Stockyard Administration, or E.K. Corrigan, concerning Miller's bond coverage. Due to this absence of inquiry, the defendant contends the sellers cannot be permitted to rely upon the previous transactions with Miller and the general knowledge of Miller as a Corrigan clearee to affix liability on the defendant for the claimant sales. The defendant bolsters this argument by stating the sellers should have been put on notice when Miller failed to use Corrigan drafts in making the purchases and that his failure to use the drafts meant that the transactions were engaged by Miller as an independent dealer rather than as a Corrigan clearee. Based on the above arguments the defendant asserts that it is not liable for the claimant purchases in this case.

Based upon an examination of all the evidence presented, the briefs, and the authorities cited, the Court concludes the plaintiff should prevail on the issue of liability in this action. Initially it must be recognized that the Packers and Stockyards Act, 7 U.S.C. section 181 *et. seq.*, is remedial legislation which should be liberally construed. *See Travelers*

[7] Though the defendant claims the plaintiff never asserted this theory in his complaint, the defendant dedicated substantially all of its posttrial brief to refuting the theory of apparent authority. Therefore, the Court shall assume the theory is in issue and will discuss it accordingly.

Indemnity Company v. Manley Cattle Company, 553 F.2d 943 (5th Cir.1977); *Glover Livestock Comm. Co. v. Hardin*, 454 F.2d 109, 111 (8th Cir.1972), *rev'd on other grounds*, 411 U.S. 182 (1973); *Arnold Livestock Sales Company, Inc. v. Pearson*, 383 F.S. 1319, 1323 (D.Neb.1974). The purpose of the Act is to protect livestock producers against losses suffered due to sales to insolvent or defaulting purchasers. *See Manley Cattle Co., supra*. Pursuant to 7 U.S.C. section 204, a reasonable bond may be required "from every market agency . . . every packer . . . and every other person acting as a dealer. . . ." The bonding requirements and regulations applicable to the instant action are set out in 9 C.F.R. Sections 201.27–201.35. It was in compliance with this regulatory scheme that E.K. Corrigan made its bond and listed Virgil Miller as its clearee.

Clause 3 of the bond provided:

> Applicable if others CLEAR through Principal
>
> (3) If the said Principal, acting as a clearing agency responsible for the financial obligations of other registrants engaged in buying livestock, viz.: (insert here the names of such other registrants as they appear in the application for registration), [Virgil Miller was listed here as an E.K. Corrigan registrant] or if such other registrants, shall (1) pay when due to the person or persons entitled thereto the purchase price of all livestock purchased by such other registrants for their own account (or) for the accounts of others and (2) safely keep and properly disburse all funds coming into the hands of such Principal or such other registrants for the purpose of paying for livestock purchased for the accounts of others, then this bond shall be null and void, otherwise to remain in full force and virtue, subject to the following terms, conditions and limitations:

Therefore, it appears plainly on the bond itself, through the listing of Miller thereon, that E.K. Corrigan would be responsible for the financial obligations of Miller. The defendant seeks to escape this conclusion by arguing: a) Miller was not a clearee at the time of the sales, having been terminated by Curtis Brown on August 6, 1984; and b) E.K. Corrigan only cleared Miller's purchases transacted on Corrigan drafts.

There are several difficulties with this argument. As previously discussed, the Court finds that Miller was a Corrigan clearee at the time of the claimant sales, therefore the defendant's assertion to the contrary is without merit.

The defendant next argues that Corrigan drafts were necessary to trigger the clearing relation between Corrigan and Miller and since Miller did not utilize Corrigan drafts in making the claimant purchases there was no clearing relation thus no bond coverage for the claimant sales. The difficulty with this argument is that the "Corrigan-drafts only" limitation the defendant seeks to engraft on the bond was never revealed to anyone. There is no such limitation on the bond itself and

none of the sellers were aware of this alleged limitation of Corrigan's clearing services. The fact that Miller used only Corrigan drafts in his previous transactions with the claimant sellers does not, in the Court's view, alter the result. Miller's failure to use Corrigan drafts on these occasions is not, when viewed against the long standing relation Miller had with E.K. Corrigan and the lack of any notice concerning the alleged rupture of that business relation, such an unusual circumstance as to put the sellers on notice that they were dealing with Miller as an independent dealer. Only one of the claimant sales, the sale by Dean Kinney, resulted in Miller issuing a personal check for payment; no payment of any kind was made in the other sales. And Kinney did contact Miller concerning this issuance of a personal check rather than a Corrigan draft, to which Miller responded that he's run out of drafts. Kinney's acceptance of this response was reasonable in light of his knowledge of Miller's long-standing relation with E.K. Corrigan as a clearee.

In *United States Fidelity and Guaranty Company v. Quinn Brothers of Jackson*, 384 F.2d 241 (5th Cir.1967) the court faced a situation similar to the one presented here. *Quinn* also involved an action on a bond under the Packers and Stockyard Act, a bond with language similar to the one at issue. *Id.* at 243 n.8. The facts of that case are as follows: T.B. Saunders a registered market agency, operated facilities at the Fort Worth stockyards. As required by the Packers and Stockyard Act, Saunders maintained a bond upon which it listed registered dealers clearing through Saunders. At that time the regulations permitted a dealer to fulfill the bond requirement by becoming a registrant on the bond of a marketing agency performing clearing services.[8] Norman Gibson was a registered dealer listed on the Saunders bond. During the week of July 20, 1964, Gibson discussed a purchase of stock with Quinn Brothers at a posted stockyard in Jackson, Mississippi. Gibson represented that clearing services would be provided by Saunders. Quinn, though never having dealt with Gibson, had satisfactorily dealt with another registrant listed as a clearee on Saunder's bond and who cleared purchases from Quinn through Saunders. In late July Quinn sold Gibson a load of cattle for which Gibson paid with a Saunders draft. Saunders honored this draft. Shortly thereafter, on August 7, Gibson purchased a second load of cattle from Quinn. There was no discussions, however, concerning Saunders clearing the second transaction nor did Gibson issue a draft in payment. Rather, Gibson made partial payment by a cashier's check and failed to pay the balance.

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[8] This regulation, 9 C.F.R. section 201.29, was amended in 1983 to require dealers to also maintain a bond for their independent buying and selling transactions thus eliminating the choice of either supplying a bond or being included as a clearee on a bond maintained by a clearing agency.

On July 31, after the first sale but before the second sale, Gibson notified Saunders he no longer wished to clear through Saunders. Neither Gibson nor Saunders, however, notified Quinn of this turn of events. Saunders did notify the Department of Agriculture of Gibson's removal request and a rider so removing Gibson was issued effective October, 1964. When Quinn sought payment from Saunders for the balance due on the second load of cattle, Saunders denied responsibility and suit ensued.

The sole defendant in *Quinn Brothers* was United States Fidelity and Guaranty, Saunder's surety. The defendant, asserting the bond did not cover the transaction, pressed two lines of argument: a) the purchase was not made at the Fort Worth yards and b) because Saunders did not agree to under take and clear this specific transaction it was not covered by the bond.

The court found that the language of the bond, which closely matches the language of the bond at issue, did not restrict the bond as argued by the defendant and stated that "on its face the bond covers payment for all livestock purchased by the registrants without restriction to the site of the purchase." *Id.* at 244. The court also rejected the defendant's contention "that the rights and liabilities granted and imposed by other sections of the Act are no more extensive than the scope of registration." *Id.* at 245. Rather, the court found that provision of clearing services was not limited to the yards at which the transactions are cleared but could be extended to purchases occurring at stockyards other than the one at which the clearing ultimately takes place.

The *Quinn* court also rejected the defendant's argument that the bond applied only when the principal agreed in advance to assume responsibility for the specific purchase. [9]

The court relied upon the fact, as found by the jury, that Saunders had undertaken to clear all of Gibson's future purchases at Quinn's. This representation, the court found, supported the defendant's liability on the bond. The *Quinn* court declined to decide whether the bond would cover a situation in which the seller had no notice or representation from the clearing agency that the purchaser dealer was under its bond or had authority to bind its credit. This situation, however, was presented in *Lewis v. Goldsborough*, 234 F.S. 524 (E.D. Ark.1964).

Lewis v. Goldsborough, is another case involving a suit upon a bond under the Packers and Stockyards Act. O.H. Goldsborough was a registered dealer and a registrant on the bond maintained by Merchant's Clearing, Inc., of Fort Smith, Arkansas. The pertinent bond provision is similar to the provision (clause 3) in issue at bar. Goldsborough, was known as a bonded buyer at the Mayor Lewis Livestock Auction Sales

[9] The bond language relied upon by the defendant in advancing this argument, see *Quinn Brothers*, 384 F.2d at 246, is strikingly similar to the language of clause 3 in the instant bond.

of Conway, Arkansas prior to October 30, 1961, and generally issued his personal check in payment of purchases. On October 30, 1961, Goldsborough purchased eighty (80) cattle from Lewis and issued a draft drawn on Merchant Clearing in payment. The next day, October 31, 1961, Goldsborough purchased another eighty-one (81) head of cattle from Lewis and issued his personal check in payment therefor. This check was dishonored. This second sale was cleared through Merchants Clearing, Inc. Suit was subsequently filed to recover the unpaid purchase price.

The defendant surety in *Goldsborough* argued that Merchant Clearing, Inc., did not act as a broker or clearing agency with respect to the sale and, therefore, was not liable for the unpaid purchase price. The defendant also argued that the bond was limited to transactions occurring at the Fort Smith Stockyards, the place of Merchants Clearing, Inc.'s registration, and that the plaintiff prior to the transaction had no notice or representation from Merchants Clearing, Inc., that Goldsborough was its clearee or able to bind its credit by any purchase at Conway, site of the Lewis yard.

The *Goldsborough* court rejected these arguments stating:

> The answer to both of these contentions is contained in the language of the bond which simply provides coverage for purchases made by a registrant at a public stockyard. Nothing in the bond indicated that its provisions are in any way restricted by a tariff filed by a market agency, nor is its liability conditioned upon a representation from the market agency that the registrant has authority to bind its credit.

Id. at 528.

Quinn Brothers and *Goldsborough* provide persuasive support for the Court's conclusion that the defendant is liable on the bond in this action. Those cases involved facts and bond language similar to that at bar. In the instant action the sellers clearly relied upon Miller's status as a Corrigan clearee in making the claimant sales; that reliance, reasonable under the facts presented, should be protected. *Cf. Hartford Accident and Indemnity Company v. Volin*, 304 F.Supp. 289, 291-92 (D.Minn.1969) (no bond liability where no reliance but of *Quinn Brothers* and *Goldsborough* the court stated, "[i]n those cases, the seller's reliance extended to the clearing agency, and deserved protection, * * * Had Thompson represented himself as Volin's clearee, it may well be that Volin's responsibility would be fixed notwithstanding their contract. The *Lewis* and *Quinn* cases, supra, so hold."). In addition, the defendant, similar to the *Quinn Brothers* and *Lewis* defendants, attempts to escape liability by claiming bond limitations which do not appear on the bonds. These limitations the Court will not abide. Therefore, on the facts presented, the Court finds the defendant liable on the bond for the unpaid purchase prices.

Though not necessary to the decision in this action, the Court finds the defendant's secondary argument that Miller was not its agent is also without merit. The defendant argues that the only apparent authority conferred on Miller arose from his possession of Corrigan drafts and Corrigan's routine payment of those drafts, and Corrigan's oversight in not removing Miller from the Corrigan bond did not create apparent authority because the sellers had no knowledge of this fact and did not rely upon it. In addition, the defendant argues that Miller's failure to use the Corrigan drafts should have alerted the sellers to the fact that Miller was acting without the alleged apparent authority in which E.K. Corrigan cloaked him. In support of this argument the defendant, in its posttrial brief, cites extensively from 3 Am.Jur.2d, *Agency*.

The Court, however, does not find this argument to be a meritorious one. The lack of Corrigan drafts alone did not so alter the pattern of dealing engaged in by Miller as to notify the sellers of the necessity of further inquiry. It is true, as the defendant contends, that "the principal is not bound where the agent exceeds the scope of his apparent authority and his want of authority is known to the person dealing with him, or if the third person actually knows, or should know, the limitations of the agent's authority." 3 Am.Jur.2d, *Agency*, section 75. But it is also true that "[t]he rule is otherwise, . . . with regard to secret limitations of the agent's authority which the third person does not know and has no duty or reason to know." *Id.* In this case the limitation on the clearing relation between Corrigan and Miller, *i.e.*, Corrigan drafts only, was an unknown limitation. The unpaid sellers did not actually know of Miller's altered status as a Corrigan clearee and Miller's dealings were not so inconsistent with his prior covered pattern of dealings as to notify the sellers of E.K. Corrigan's alleged revocation of Miller's authority. Rather, E.K. Corrigan neglected to perform its own duty by failing to notify others that Miller had been terminated as a clearee. This neglect should not be shifted to the sellers to bear.

The next issues presented for resolution are whether prejudgment interest and an attorney's or trustee's fee are available to the plaintiff.

On the issue of prejudgment interest the plaintiff argues, and the defendant agrees, that the matter is a discretionary one for the Court. It is clear that the Packers and Stockyard Act neither prohibits nor demands that prejudgment interest be awarded. The Act does admonish, however, that "[i]f any person subject to this chapter violates any of the provisions of this chapter, . . ., relating to the purchase, sale, or handling of livestock, he shall be liable to the person or persons injured thereby for full amount of damages sustained in consequence of such violation." *See* 7 U.S.C. section 209(a). This matter, contrary to the defendant's argument that Nebraska's restrictive rules on liquidated damages control, is controlled by federal law. *See Rowse v. Platte Valley Livestock, Inc.*, 604 F.Supp. 1463, 1470 (D.Neb.1985)

("Nebraska's restrictive rules on liquidation do not control the availability of prejudgment interest under either the Interstate Commerce Act or the Packers and Stockyard Act.") The theory behind prejudgment is to "[help] compensate plaintiffs for the time cost of money damages they have incurred." *General Facilities v. National Marine Service, Inc.*, 664 F.2d 672, 673 (8th Cir.1981).

Based on the foregoing authorities, the Court finds that prejudgment interest is available and should be awarded in this action. The unpaid purchase prices which are the issue at bar have been unavailable to the sellers since at least December, 1984. The sellers should be compensated for the loss of the funds' availability with an award of prejudgment interest. Federal law clearly supports this conclusion. It also appears that prejudgment interest would be available under Nebraska law. In *Nebraska Public Power District v. Borg-Warner*, 621 F.2d 282 (8th Cir.1980), the court recognized that Nebraska law allows prejudgment interest when the amount of the claim is liquidated. In Nebraska, the term liquidated is defined as:

> A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. Examples are claims upon promises to pay a fixed sum, claims for money had and received, claims for money paid out, and claims for goods or services to be paid for at an agreed rate. [*Abbott v. Abbott*, 188 Neb.61, 195 N.W.2d 204, 209 (1972) (citations omitted), *quoting* McCormick, *Damages* section 54 (1935).

Id. at 285.

The court stated further that "a common theme in Nebraska caselaw is that [liquidated] damages must be 'readily determinable' or 'ascertainable by computation or a recognized standard.'" *Id.* at 286. In the instant case there has been no dispute as to the amount of the unpaid purchase prices. Though originally there were four claims of unpaid sales, one having been subsequently settled, this does not alter the ready identification of the amount claimed to be due and owing. Therefore, even under Nebraska law it appears prejudgment would be available in this action.

The final issue for resolution is the availability of a trustee's and/or attorney's fee for the plaintiff in this action. The plaintiff is Robert M. Cook, trustee representative of the claimant sellers herein. Mr. Cook is also the attorney bringing this action on the bond, therefore, his variant roles as trustee and attorney are virtually indistinguishable. The problem with this melding of roles arises from determining the source of the available fees, if any. Neither the statute nor the bond provide for the payment of either a trustee's or attorney's fees or costs. But letters by Jack Brinkmeyer indicate that the courts have awarded *trustee* fees and costs from the proceeds of the bond. See exhibits 2, 7 (Hartford letter), and 10.

In his brief the plaintiff argues that the Packers and Stockyards Act is silent on the issue of an attorney's fees in an action on a bond. Therefore, he argues, the Court should assess the request for an attorney's fees under provision of state statutes. In this regard the plaintiff relies on the cases of *Lewis v. Goldsborough*, 234 F.Supp.524 (E.D.Ark.1964) and *Baldwin v. Hartford Accident and Indemnity Company*, 168 F.Supp. 86 (D.Neb.), *aff'd* 262 F.2d 202 (8th Cir.1958). The plaintiff also makes policy arguments if favor of awarding a trustee's fee.

In this action neither the bond nor the rules regulating the bond, 9 C.F.R. section 201 provide for an attorney's fees. *Cf* 7 U.S.C. section 210(f) (attorney's fees available in suit to enforce Secretary's order for reparation). In light of this statutory silence, several courts, when confronted with a request for an attorney's fee in a suit on a Packers and Stockyards Act bond, have looked to state law in determining whether an attorney's fee should be awarded. In *Baldwin v. Hartford Accident and Indemnity Company*, 168 F.Supp. 86, 116 (D.Neb.), *aff'd* 262 F.2d 202, 205 (8th Cir.1958), District Court Judge Delehant awarded an attorney's fee in a bond suit similar to the case at bar on the strength of a Nebraska statute. The statute, Neb. Rev. Stat. section 44-359, allowed recovery of a reasonable attorney's fee "[i]n all cases where the beneficiary, or other person entitled there to, brings an action upon any type of insurance policy . . . against any company, person or association doing business in this state. . . ." Judge Delehant applied this statute to the action despite the fact that the action was brought in federal rather than state court. Judge Delehant's ruling, however, was limited only to awarding an attorney's fee and did not address the issue of a trustee's fee or costs, stating,

> the court has limited its thinking solely to the question whether the trustee plaintiff has the right to the recovery, as part of the costs of the action, and against the defendant, Hartford Accident and Indemnity Company, of a fee for his attorney. It has not reached, and does not discuss, the other and quite different problem, which is not now presented, whether, as against the beneficiaries of his trust he might be entitled to an award on account of the expenses of the litigation whereby a fund is distributable to such beneficiaries has been recovered or protected.

Id.

In *Baldwin*, unlike the instant action, the trustee and attorney were separate individuals.

On appeal, the Eighth Circuit affirmed Judge Delehant's ruling in regard to the award of an attorney's fee on the basis of the Nebraska statute. *Hartford Accident and Indemnity Company v. Baldwin*, 262 F.2d 202, 205 (8th Cir .1958). The Eighth Circuit acknowledged that the issue concerning the attorney's fee had not been "urged in argument at the bar or in the brief and we may consider it abandoned", but

nevertheless, reached out and decided the issue stating "[i]t [*i.e.*, any objection] is in any event without merit." *Id.*

A similar result was reached in *Lewis v. Goldsborough*, 234 F.Supp. 524, 530 (E.D.Ark. 1964), another suit on a Packers and Stockyard Act bond. In *Lewis*, the district court distinguished between the various provisions of the Packers and Stockyards Act and recognized that section 204 was silent on the issue of awarding an attorney's fee. The court then relied upon *United States For the Use and Benefit of Magnolia Petroleum Co. v. H.R. Henderson and Co.*, 126 F.Supp. 626, 637 (W.D.Ark.1955) (which had construed the Miller Act, also silent on the issue of an attorney's fee, in light of an Arkansas statute which allowed assessment of an attorney's fee against sureties) for the proposition that state law governed the award of an attorney's fee. In *Lewis*, the district court awarded an attorney's fee based upon the Arkansas statute. *Id. See also United States Fidelity and Guaranty Company v. Clover Creek Cattle Company*, 92 Id. 889, 452 P.2d 993, 1004-05 (1969) (in suit on Packers and Stockyards Act bond court awarded an attorney's fee based on Idaho statute).

This issue has been ruled upon more recently in the District of Nebraska. In *Becker v. Kozo*, 53 F.R.D. 416, 423 (D.Neb.1971), an action on a bond written under the Packers and Stockyards Act, Judge Urbom found that an attorney's fee was recoverable, stating simply "[a] fee should be allowed the plaintiff's counsel in the amount of Three Thousand Dollars ($3,000.00)." *But cf, Arnold Livestock Sales Company, Inc. v. Pearson*, 383 F.Supp. 1319, 1323 (D.Neb.1974) (where, in a similar action, the court rejected plaintiff's request for an attorney's fee stating the "[p]laintiff seeks attorneys' fees under 7 U.S.C. Section 210(f), but that section does not apply to actions on bonds under 7 U.S.C. section 204 and the Court finds no justification for granting such fees.").

Based on the statutory authority of Neb.Rev.Stat. section 44-359 and the foregoing case law, the Court concludes that a reasonable attorney's fee should be awarded in this action. Furthermore, a strong policy argument supports sanctioning an award of an attorney's fee in this action. As stated previously, the rationale undergirding the Packers and Stockyards Act bond requirement is to protect the producer from financial loss in dealing with bankrupt or defaulting dealers. This rationale is subverted when the producer is compelled to sue on the bond and incur the legal expenses, including attorney's fees, inherent therein. In this scenario the proceeds of the bond, originally designed to protect the producer's selling price, are partially diverted to compensate the producer's attorney rather than making the producer fiscally whole. For these reasons the Court shall award the plaintiff a reasonable attorney's fee in this action. This fee, at the rate of sixty-five

($65.00) dollars per hour, [10] shall be assessed for payment against the defendant surety.

The Court also finds that a trustee's fee should be awarded in this action. Again, policy reasons strongly suggest this conclusion. Though neither the statute nor the bond itself provide for the payment of a trustee fee or costs incurred by the trustee, to deny this claim would inhibit potential trustees from accepting assignments in this area. The trustee's costs and fee, however, shall be assessed against the proceeds of the bond rather than against the defendant. The Court finds that a reasonable trustee's fee in this action is forty ($40.00) dollars per hour.

Robert M. Cook, trustee and attorney in this action, has supplied the Court with a computer printout of the time expended and the costs incurred in pursuing this matter. *See* exhibit 25. The accuracy of this exhibit has not been challenged. In an effort to distinguish the trustee's fee and costs from the attorney's fee and costs the Court has examined this printout and makes the following findings: a) the hours expended and costs incurred up to and including July 30, 1985, shall be attributed to the trustee's activities; and b) the hours expended and the costs incurred thereafter shall be attributed as attorney's activities. Therefore, for section (a) above the Court awards Robert M. Cook, as trustee, the following amounts: a trustee's fee in the amount of $1,200.00 (reflecting 30 hours of work multiplied by forty ($40.00) dollars per hour) and costs in the amount of $168.51; for a total of $1,368.51 which amount is assessed against the proceeds recovered on the bond.[11] For section (b) above the Court awards Robert M. Cook, as attorney, the following amounts: an attorney's fee in the amount of $12,482.50, which represents a rate of sixty-five (65.00) dollars per hour for 165.6 hours [12] of time expended by Robert M. Cook and a rate of thirty-five ($35.00) dollars per hour for 49.1 hours expended by Steven G. Wortmann; and costs in the amount of $894.56, for a total of $13,737.06. This amount shall be assessed against the defendant surety.

An Order reflecting the Court's Memorandum shall be filed herewith.

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[10] Though Robert M. Cook's rate of compensation shall be sixty-five ($65.00) dollars per hour, Steven G. Wortmann's time shall be billed at thirty-five ($35.00) dollars per hour.

[11] After this amount has been deducted from the bond proceeds, the remaining proceeds should be divided among the unpaid sellers according to their proportionate interests.

[12] This total number of hours credited to Robert M. Cook as attorney does not include the time spent on September 24, 1985 and October 2, 1985, on activities related to the Dennison Livestock claim. That claim was settled prior to suit and time so spent will not be attributed to this litigation.

ROBERT M. COOK, Trustee on Behalf of DENISON LIVESTOCK AUCTION, INC., DUNLAP LIVESTOCK AUCTION, WILLARD KEPLEY and DEAN KINNEY, Plaintiff, v. HARTFORD ACCIDENT AND INDEMNITY CO., Defendant. Civil No. 85-0-847. Order and judgement filed January 23, 1987.

UNITED STATES DISTRICT COURT, DISTRICT OF NEBRASKA

Order And Judgement

Richard E. Robinson, Senior Judge.

As reflected in the accompanying Memorandum Opinion, the Court finds the defendant liable on the bond for the unpaid purchase prices at issue. Therefore,

IT IS ORDERED:

a) that the defendant remit to the plaintiff-trustee the unpaid purchase prices in the amount of $62,377.51, plus prejudgment interest at the legal rate, calculated from June 26,1985, the date of the trustee's demand for payment, until the date of actual payment;

b) that the defendant pay Robert M. Cook an attorney's fee in the amount of $12,482.50 and costs of $894.56; and

c) that Robert M. Cook is awarded a trustee's fee in the amount of $1,200.00 and trustee's costs of $168.51, which amounts shall be recovered from the proceeds of the bond realized in the action.

IT IS SO ORDERED.

BEEF NEBRASKA, INC. Petitioner, *v.* UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF AGRICULTURE, Respondent. Civil No. 85-2534 (USDA P&S Docket No. 6094 [44 A.D. 2786].) Decided December 10, 1986.

Packer—Issuance of checks drawn on distant banks, thus delaying the collection of funds—No deprivation of right to obtain answers to interrogatories.

Beef Nebraska's use of a geographically remote or "country bank" on which checks were drawn to pay livestock sellers, resulted in a delay in the collection of funds which is an unfair practice under the Act. It is also held that the Administrative Law Judge did not deprive Beef Nebraska of its right to answers to its interrogatories, to whatever extent such right exists.

Kenneth H. Vail and *Raymond W. Fullerton*, for respondent.

William T. Oakes and *Steven D. Johnson*, Omaha Nebraska, for petitioner.

William J. Weber, Administrative Law Judge.

Donald A. Campbell, Judicial Officer.

UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

Before FAGG, BOWMAN and TIMBERS,* Circuit Judges.

TIMBERS, *Circuit Judge*.

Petitioner Beef Nebraska, Inc. ("Beef Nebraska"), a "packer" subject to the provisions of the Packers and Stockyards Act, 7 U.S.C. §§ 181-231 (1982 & Supp. III 1985) ("the Act"), petitions this court to set aside a decision and order entered November 26, 1985 by respondent United States Department of Agriculture ("USDA"), Donald A. Campbell, *Judicial Officer*, ordering Beef Nebraska to cease and desist from paying for livestock with checks drawn on remote, distant, or country bank accounts. The judicial officer held that Beef Nebraska's use of checks drawn on a distant bank to pay for livestock often lengthened the check-clearing process by at least one day and hence delayed the "collection of funds" in violation of § 409(c) of the Act, 7 U.S.C. § 228b(c) (1982) ("§ 228b(c)"). In its petition, Beef Nebraska claims, first, that its use of checks drawn on the distant bank did not delay the "collection of funds" within the meaning of § 228b(c), and, second, that an administrative law judge, in denying its motion to require USDA to answer certain interrogatories, deprived it of its right to pre-hearing discovery under the United States Constitution and certain statutes and regulations.[1]

We hold that Beef Nebraska's use of checks drawn on the distant bank delayed the collection of funds in violation of the unambiguous proscription of § 228b(c). We further hold that the administrative law judge did not deprive Beef Nebraska of its right to obtain answers to its interrogatories, to whatever extent such right exists. We deny the petition for review and affirm the order.

I.

Beef Nebraska conceded at oral argument before us that, if the judicial officer interpreted § 228b(c) correctly, the record before him contained sufficient evidence to support the conclusion that Beef Nebraska violated the Act. Beef Nebraska thus does not dispute the facts, but rather disputes the judicial officer's interpretation of § 228b(c). We

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* Of the Second Circuit, by designation.

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[1] Beef Nebraska also claims that the judicial officer erred in taking notice of certain documents and that the order of the judicial officer was "overly broad" in that it purported to restrict the actions of Beef Nebraska's officers, directors, agents, and employees, who were not named in USDA's complaint. We hold that these claims are without merit. The judicial officer's order was not overly broad since it reached activities only "in connection with [Beef Nebraska's] operations as a packer." *Cf. Bruhn's Freezer Meets v. USDA*, 438 F.2d 1332, 1343 (8th Cir. 1971). Even if the judicial officer erred in taking notice of the documents, Beef Nebraska has failed to show that the error was prejudicial. 5 USC § 706 (1982).

summarize only those facts believed necessary to an understanding of the issues raised in the petition.

Beef Nebraska is engaged in the business of buying livestock in commerce for slaughter and sale. Hence it is a "packer" subject to the provisions of the Act. 7 U.S.C. § 191 (1982). Its sole processing plant is in Omaha, Nebraska. Its daily purchases of livestock average $305,000. They are from livestock sellers located throughout the mid-western United States.

The acts leading to the instant petition began in July 1982. At that time Beef Nebraska's use of a new checking account to pay livestock sellers often increased the period of time between the point at which it tendered a check to a seller and the point at which the seller had unconditional access to the funds pursuant to the check. Prior to July 1982, Beef Nebraska paid livestock sellers with checks drawn on its ordinary corporate account at the Omaha National Bank ("ONB"). In view of ONB's location in Omaha, the Federal Reserve System classifies it as a "city" bank. Livestock sellers paid with checks drawn on Beef Nebraska's ONB account would deposit such checks in their own banks. These banks often granted the sellers provisional credit. Provisional credit became final only after the checks cleared Beef Nebraska's ONB account. When a check drawn on that account was present to the Federal Reserve Bank in Omaha ("the Federal Reserve Bank"), the check cleared at a time determined under Federal Reserve System schedules applicable to city banks. At that time the funds became available to the depositing bank. In general, under these schedules a check drawn on Beef Nebraska's ONB ordinary corporate account cleared on the same day that the check was presented to the Federal Reserve Bank. When the checks were presented to commercial clearinghouse associations—private collection systems with which ONB maintained agreements for such purposes—the checks cleared at least as quickly.

Presentments of checks drawn on the accounts of ONB's customers are made throughout the day at the Federal Reserve Bank. The same is true of checks presented to several commercial clearinghouse associations and by other banks directly to ONB. These numerous presentments prevent ONB from predicting accurately the value of checks which will clear against its customers' ordinary checking accounts on any given day. As a result, Beef Nebraska either had to maintain large idle balances in its checking account or had to pay overdraft charges on checks drawn on insufficient funds. To avoid this dilemma, Beef Nebraska opened a "controlled disbursement" checking account ("controlled account") at ONB on June 28, 1982. A check drawn on the controlled account appeared on its face to have been drawn on the State Bank of Palmer ("the Palmer Bank"), a small bank located in Palmer, Nebraska, 125 miles west of Omaha. In fact, however, pursu-

ant to an agreement between ONB and the Palmer Bank, ONB would intercept the check at the Federal Reserve Bank, process the check, and debit its customer's controlled account. The Palmer Bank never received or processed the check. In view of its remote geographic location, the Palmer Bank is classified by the Federal Reserve System as a "country" bank. Under Federal Reserve System schedules applicable to country banks, a check drawn on the Palmer Bank generally cleared the day *after* it was presented to the Federal Reserve Bank. It therefore generally cleared one day later than did a check drawn on ONB, a city bank. The Palmer Bank was not a member of any commercial clearinghouse association. In view of its size and remote location, it did not receive direct presentments from other banks. ONB therefore could take advantage of the additional day between presentment and clearing to predict accurately the value of checks that would clear the next day against its customers' controlled accounts.

On July 12, 1982 Beef Nebraska began paying livestock sellers with checks drawn on its ONB controlled account. Since those checks appeared to have been drawn on the Palmer Bank, Beef Nebraska gained an extra day in the check-clearing process. Concurrently, livestock sellers often faced a delay of one day between the time of deposit and the time they had final credit. During this period they could not collect the funds to which they were entitled pursuant to Beef Nebraska's checks.

On January 27, 1983 the Secretary of USDA ("the Secretary") served an administrative complaint on Beef Nebraska. 7 U.S.C. § 193 (1982). The complaint charged that its use of checks drawn on the Palmer Bank constituted an unfair practice under § 202(a) of the Act, 7 U.S.C. § 192(a) (1982), in that such use violated § 228b(c). Section 228b(c) provides that "[a]ny delay ... by a ... packer purchasing livestock, [in] the collection of funds as herein provided ... shall be considered an 'unfair practice' in violation of this chapter ...."

A hearing on the complaint took place before an administrative law judge ("the ALJ") on September 27 and 28, 1983. 7 U.S.C. § 193. Prior to the hearing the ALJ denied motions by Beef Nebraska to require USDA to answer certain interrogatories. The ALJ's denial of these motions serves as the basis for Beef Nebraska's claim before us that its right to prehearing discovery was violated.

On April 3, 1985 the ALJ filed his decision and order requiring Beef Nebraska to cease and desist from paying livestock sellers with checks drawn on the Palmer Bank. On May 8, 1985 Beef Nebraska filed an appeal from the decision and order of the ALJ to the judicial officer. The Secretary had delegated authority to the judicial officer to make final decisions of the USDA. 7 C.F.R. § 2.35 (1986).

In a decision and order filed November 26, 1985, the judicial officer, after a comprehensive analysis of the language and legislative his-

tory of § 228b(c), concluded that Beef Nebraska's use of the controlled account delayed the collection of funds and hence constituted an unfair practice under the Act. The judicial officer also concluded that the ALJ did not deprive Beef Nebraska of its right to discovery. He ordered that Beef Nebraska, "in connection with its operations as a packer, shall cease and desist from issuing checks in payment for livestock drawn on remote, distant, or country accounts including any accounts with [the Palmer Bank] ...."

On December 31, 1985, Beef Nebraska petitioned this court to set aside the order of the judicial officer.

We deny the petition for review and affirm the decision and order of the USDA.

II.

We turn first to the issue whether Beef Nebraska's use of checks drawn on the Palmer Bank resulted in a delay in the collection of funds within the meaning of § 228b(c).

Between 1958 and early 1975, 167 meatpackers went bankrupt, leaving sellers unpaid to the extent of more than $43 million worth of livestock. S.Rep. No. 932, 94th Cong., 2d Sess. 4-5, *reprinted in* 1976 U.S. Code Cong. & Ad.News 2267, 2271. This prompted Congress in 1976 to amend the Act to add, among other things, the "prompt payment" provisions of § 228b. Pub.L. No. 94-410, § 7, 90 Stat. 1250 (1976). Section 228b(a) sets forth methods and time limits for payment. A packer may pay a livestock seller in cash, by wire transfer, or by check. If payment is made by check, absent unusual circumstances the packer physically must deliver the check to the seller before the close of the business day following transfer of possession of the livestock. Section 228b(c), the subsection which we must interpret, provides in relevant part as follows:

> "Any delay or attempt to delay by a ... packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an 'unfair practice' in violation of this chapter ...."

7 U.S.C. § 228b(c).

The judicial officer concluded that the extra day of "float" resulting from Beef Nebraska's use of checks drawn on the Palmer Bank constituted "[a]ny delay ... by a ... packer purchasing livestock, [in] the collection of funds as herein provided". "Float" means the time between the point at which Beef Nebraska tenders a check to a seller and the point at which the seller has unconditional access to the funds.

As a general rule, we review the Secretary's determinations on questions of law under a *de novo* standard. *Rice v. Wilcox,* 630 F.2d 586, 589 (8th Cir.1980); *see* 5 U.S.C. § 706 (1982). When our review is of an agency's interpretation of a statute that it administers, however, the

agency's determination often is entitled to some deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). Beef Nebraska argues that, for a variety of reasons, the judicial officer's interpretation of § 228b(c) is entitled to no deference. We need express no opinion as to the merits of that argument, for, regardless of any deference given the judicial officer's interpretation, Beef Nebraska's conduct comes so squarely within the unambiguous proscription of § 228b(c) that the order under review must be affirmed and the petition must be denied.

A.

The Act does not define "collection of funds". "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979); *accord, Escondido Mutual Water Co. v. La Jolla Bank of Mission Indians*, 466 U.S. 765, 772 (1984) ("[I]t should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses".). In Webster's Third New International Dictionary 921 (1963), "fund" used as a noun in its plural form is defined as "money on deposit which is held at a specified place and on which checks or drafts can be drawn". The same dictionary defines "collection" as, among other things, "the securing of payment of a check ... by presentation to the payer for cash". *Id.* at 444. *See also* U.C.C. § 4–105(d) (defining "Collecting bank" as "any bank handling the item for collection except the payor bank").

Thus, the ordinary meaning of the phrase "collection of funds" is the securing of payment of a check from money on deposit on which the check is drawn. By drawing checks on the Palmer Bank—located 125 miles from its sole processing plant—Beef Nebraska prolonged the time it took for a livestock seller to secure payment of Beef Nebraska's check from the account on which the check was drawn. The words of § 228b(c), therefore, when interpreted in accordance with their ordinary meaning, compel the conclusion that Beef Nebraska's use of the Palmer Bank "delay[ed]" the "collection of funds". Further, since the statute prohibits "any" delay, it is of no consequence that Beef Nebraska's use of the Palmer Bank resulted in a delay of only one day or that the delay did not always occur.

In light of this unambiguous language, Beef Nebraska makes the rather remarkable assertion that § 228b(c) has "nothing to do with banking practices". It argues that, since "collection of funds" is followed by "as herein provided", "collection of funds" must be interpreted to be synonomous with "payment" as that word is used in § 228b(a). Under this interpretation, Beef Nebraska argues, actual delivery of a check within the time requirements of § 228b(a) is by definition "prompt payment" and hence cannot be characterized as "delay"

under § 228b(c) even if the check is drawn on a geographically-remote bank. This argument ignores well-established rules of statutory construction. We reject it. It is noteworthy that the phrase "collection of funds" appears only once in § 228b. By contrast, the word "payment" is used five times. We must "presume that the use of different terminology within a statute indicates that Congress intend to establish a different meaning." *National Insulation Transportation Committee v. ICC*, 683 F.2d 533, 537 (D.C.Cir.1982). *Accord, United States v. Rice*, 671 F.2d 455, 460 (11th Cir.1982) (Congress' use of different verb forms is "properly take[n] as evidence of an intentional differentiation"); *Lankford v. Law Enforcement Assistance Administration*, 620 F.2d 35, 36(4th Cir.1980) (same). Moreover, were we to adopt Beef Nebraska's construction of § 228b(c), the redrafted version which follows at best would create a redundancy, and at worst would make no sense:

> "Any delay ... by a packer purchasing livestock, *payment*, or otherwise for the purpose of or resulting in extending the normal period of payment ... shall be an 'unfair practice'...."

Where, as here, a "statute admits a reasonable construction which gives effect to all of its provisions", we decline to "adopt a strained reading which renders one part a mere redundancy." *Jarecki v. G.D. Searle & Co* , 367 U.S. 303, 307-08(1961). *Accord, State of New York v. Shore Realty Co.*, 759 F.2d 1032, 1044 (2d Cir.1985). Under a reasonable construction, we hold that the phrase "as herein provided" does not change the ordinary meaning of "collection of funds", but rather directs that the delays in the "collection of funds" prohibited by § 228b(c) are those that occur with respect to checks delivered in accordance with § 228b(a).

We have considered carefully Beef Nebraska's other arguments based on the language and structure of § 228b. To accept them likewise would require us to adopt a strained reading of the statute contrary to its unambiguous language. We conclude that they are without merit.

B.

Beef Nebraska argues that the legislative history of § 228b demonstrates that the judicial officer misinterpreted the statute. Ordinarily, when confronted with a statute such as § 228b(c) that is clear and unambiguous, we need not look to legislative history to ascertain its meaning. *Maine v. Thiboutot*, 448 U.S. 1, 6 n. 4(1980). Nevertheless, we have examined the legislative history cited by Beef Nebraska and conclude that it provides ample support for the judicial officer's interpretation.

Moreover, the legislative history of § 228b is rife with expressions of concern regarding the dangers caused by packers paying for livestock with checks drawn on remote banks. *E.g.*, H.R.Rep. No. 1043, 94th Cong., 2d Sess. 8 (1976) (noting complaints by livestock sellers of de-

lays in payment resulting from "use of ... checks drawn on distant banks"); 122 Cong.Rec. 18,834 (1976) (statement of Sen. Dole) ("manipulation by using distant banks, coupled with other particular circumstances surrounding [bankruptcy of a packer] caused nearly 1,000 farmers to hold worthless checks amounting to over $20 million last year."); 122 Cong.Rec. 12,884 (1976) (statement of Rep. Harkin) ("The transgressions of [a bankrupt packer] have indicated that the packers can bend the law to serve their own interest at the expense ... of the producer. For example, [the bankrupt packer] maintained bank accounts in Seattle, Wash., and Salem, N.C., to increase the float time for clearing checks. Obviously this float ... resulted in the magnitude of the loss to producers.").

The unambiguous language of § 228b(c), coupled with its legislative history, makes clear that Congress intended to prohibit packers from extending float by drawing checks on banks located far from the packers' places of operation. Accordingly, we hold that Beef Nebraska's use of checks drawn on the Palmer Bank to pay livestock sellers resulted in a "delay" in the "collection of funds" within ;the meaning of § 228b(c).

III.

Beef Nebraska claims that the ALJ, in violation of the United States Constitution and certain statutes and regulations, deprived it of its right to prehearing discovery in denying its motions to require USDA to answer interrogatories.

Beef Nebraska made four motions to require answers to interrogatories. The ALJ denied all four motions, each of which related to the same interrogatories. In denying the third motion, the ALJ stated that, although "[t]he record does not show relevancy or materiality at this time," and although "a search even to the outer limits of my imagination has failed in this respect", Beef Nebraska "will have further opportunity to present argument, offers of proof or evidence to show why the myriad aspects they raise are relevant and material."

Beef Nebraska argues that the ALJ's "*per se* denial of discovery" deprived Beef Nebraska of its rights. This argument need not detain us long. First, as the judicial officer stated in his decision, Beef Nebraska does *not* contend that it did not have pre-hearing access to all exhibits to be offered by USDA, lists of its witnesses and summaries of the witness' expected testimony. To label the ALJ's refusal to require USDA to answer interrogatories as a "*per se*" denial of discovery strikes us as a mischaracterization of the events that occurred before the ALJ. Second, an examination of Beef Nebraska's interrogatories shows that the ALJ was correct in his assessment of their relevance. The majority of the interrogatories appear to be designed to elicit information more relevant to enabling Beef Nebraska to choose sellers with whom to conduct future business or to determining why USDA was

enforcing § 228b(c) than to allowing Beef Nebraska to prepare its defense. For example, one interrogatory asked USDA to "[s]tate the name of any ... company ... which has ... complained ... about Beef Nebraska's banking practices." Whatever may be Beef Nebraska's right to pre-hearing discovery, nothing required the ALJ to sift through the far-reaching motions in the hope of finding an interrogatory relevant to the preparation of Beef Nebraska's defense.

In light of Beef Nebraska's pre-hearing access to exhibits and witness lists and the irrelevance of its interrogatories, we need not decide the extent to which the statutes and regulations on which it relies require an ALJ to compel answers to interrogatories that *are* material to a packer's preparation of its defense. In passing, however, it is noteworthy that the statutes and regulations relied on by Beef Nebraska have no such requirement. *See Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir) ("The Packers & Stockyards Act makes no provision for pre-trial discovery and the rules of practice governing proceedings under the act do not provide for discovery.") (footnote omitted), *cert. denied*, 400 U.S. 943 (1970). Similarly, we need not decide the extent to which the Constitution protects packers' right to answers to their interrogatories. *Compare Withrow v. Larkin*, 421 U S. 35, 46 (1975) (due process requirement of fair trial in a fair tribunal applies to administrative agencies which adjudicate) *and McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979) (before administrative agency, "discovery must be granted if in the particular situation a refusal to do so would so prejudice a party to deny him due process.") *with Silverman v. Commodity Futures Trading Commission*, 549 F.2d 28, 33(7th Cir, 1977) ("There is no basic constitutional right to pretrial discovery in administrative proceedings. . . . Nevertheless the due process clause does require the fundamental fairness of the administrative hearing.") *and NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 857-58 (2d Cir.1970) ("It is well settled that parties to judicial or quasi-judicial proceedings are not entitled to pre-trial discovery as a matter of consitutional right"), *cert denied*, 402 U.S. 915 (1971). To whatever extent such a right exists, it clearly was not violated here

Accordingly, we hold that the ALJ did not deprive Beef Nebraska of its right to obtain answers to its interrogatories, to whatever extent such right exists.

IV.

To summarize:

Section 228b(c) makes "[a]ny delay . . . by a . . . packer purchasing livestock [in] the collection of funds as herein provided" an unfair practice under the Act. When interpreted in accordance with their ordinary meaning, the words of the statue proscribe acts by packers which extend the "float" on checks used to pay livestock sellers. Beef Nebraska's use of a geographically remote bank had just that effect.

We therefore hold that its use of checks drawn on the Palmer Bank to pay livestock sellers resulted in a "delay" in the "collection of funds" within the meaning of § 228b(c). We hold also that the ALJ did not deprive Beef Nebraska of its right to answers to its interrogatories, to whatever extent such right exists.

Petition for review denied; order affirmed.

DISCIPLINARY DECISIONS

In re: WILLIAM T. POWELL. P&S Docket No. 6248. Decision filed March 7, 1985.

Dealer —Market Agency—Bonding requirement—Insufficient funds checks—Failure to pay—Suspended as registrant.

Respondent engaged in the business of a dealer, buying and selling livestock in commerce, without filing a reasonable bond or its equivalent; issued insufficient funds checks in purported payment for livestock; and failed to pay and failed to pay when due for livestock purchases. Respondent was suspended as a registrant for five years and thereafter until he complies fully with the bonding requirements under the Act and demonstrates that he is no longer insolvent.

Barbara S. Harris, for complainant.

Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

Pending for determination is a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging violations of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 et seq., hereafter called the "Act") and regulations issued pursuant to said Act.

The complaint charges that respondent willfully violated: (1) section 312(a) of the Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30) by buying and selling livestock in commerce without being properly bonded, and (2) sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) by issuing non-sufficient funds checks and failing to pay, when due, for livestock.

Respondent filed an answer in which he admitted the material allegations of the complaint, and requested oral hearing.

An oral hearing was held in Raleigh, North Carolina on November 7, 1984. Respondent represented himself and complainant was represented by Barbara S. Harris of the Office of the General Counsel. At the close of the hearing, the time was fixed for the filing of briefs.

Findings Of Fact

1. William T. Powell, hereinafter referred to as the respondent, is an individual whose mailing address is Box 155, Fairmont, North Carolina 28340.

2. Respondent, at all times material herein, was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

3. During the period from January 25, 1983, through September 26, 1983, respondent engaged in the business of a dealer, buying and selling livestock in commerce for his own account, without having and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations

4 Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth below, purchased livestock and in purported payment therefor, issued checks which were returned unpaid by the bank upon which they were drawn because respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn.

Date of Purchase	Check Issued To	No. Of Head	Amount Of Check
7/14/83	Powell Livestock Company	123	$39,681.03
8/4/83	Powell Livestock Company	103	26,381.11

5 Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth in finding of fact 4, purchased livestock and failed to pay, when due, the full purchase price of such live stock.

6 As of October 27, 1983, there remained unpaid a total of $62,562.14 for such livestock purchases set forth in finding of facts 4 and 5 As of the date of hearing there still remained an unpaid balance of about $39,000 (Tr 22, 25)

7 On June 25, 1968, the Judicial Officer of the United States Department of Agriculture issued a consent order against the respondent (In re Powell Livestock, Inc., P & S. Docket No. 3957). The provisions of that order pro vide:

> "Respondent, its officers, directors, agents and employees, directly or through any corporate or other device, in connection with respondent's operations as a dealer, shall cease and desist from (1) issuing checks or drafts in payment for livestock purchased in commerce without having and maintaining sufficient funds on deposit in the bank account on which they are drawn to pay such checks or drafts; and (2) failing to pay,

when due, the full purchase price of livestock purchased in commerce.:

8. On February 6, 1969, a Judgment was issued by the United States District Court for the Eastern District of North Caro'ina, Fayetteville Division, in the case captioned *United States of America v. William T. Powell*, Civil No. 844. Pursuant to the order issued in that case, respondent was permanently enjoined from:

> ...engaging in business, in commerce, within the meaning of the Packers and Stockyards Act, 1921, as amended and supplemented, in any capacity for which registration and bonding are required under the Act, without ... furnishing a valid bond, or its equivalent ...

9. On April 10, 1972, a Decision and Order was issued against the respondent by the Judicial Officer in the case of *In re William T. Powell*, P&S Docket 4549. The provisions of that order provide, in part:

Respondent shall cease and desist from:

1. Operating as a dealer while his current liabilities exceed his current assets;

2. Failing to pay, when due, the full purchase price of livestock purchased in commerce;

3. Issuing checks in payment for livestock purchased in commerce without having and maintaining sufficient funds on deposit in the bank account upon which they are drawn to pay such checks;

. . . . . .

In addition, the order suspended respondent as a registrant for 30 days and thereafter while insolvent.

Conclusions

Upon the basis of the record evidence, it is concluded that respondent violated the Act and regulations in that:

1. Respondent operated without a bond; and

2. Respondent issued non sufficient funds checks and failed to pay promptly for livestock.

I

In his answer, respondent admitted that during the period from January 25, 1983, through September 26, 1983, he engaged in the business of a dealer, buying and selling livestock in commerce, without having a reasonable bond or its equivalent. The record evidence further establishes that Mr. Powell presently does not have a bond on file with the Secretary of Agriculture.

All market agencies and dealers are required to file a bond or bond equivalent with the Packers and Stockyards Administration (9 C.F.R. § 201.29(a)).Moreover, it has long been held that for a dealer to continue to buy and sell livestock in commerce without maintaining the required bond or bond equivalent is a willful violation of section 312(a) of the Act (7 U.S.C. § 312 (a)) and sections 201.29 and 201.30 of the

regulations (9 C.F.R §§ 201.29, 201.30). In re *C.J. Edzards*, 37 A.D. 1880, 1886 (1978); *In re V.J. Burds*, 28 A.D. 686 (1969). Accordingly, it is clear that respondent's dealer activities during the period of January 25, 1983, through September 26, 1983, were in violation of section 312(a) of the Act and sections 201.29 and 201.30 of the regulations.

II

By respondent's own admission, on two separate occasions, he issued checks in purported payment for livestock which were returned for nonsufficient funds in his account. The issuance of "nonsufficient funds" checks has long been held in proceedings before the Secretary of Agriculture to violate the Packers and Stockyards Act. *In re Lewis and DeJong*, 33 A.D. 1294 (1974); *In re Adolf Sklar*, 31 A.D. 872 (1972); *In re Milton Bryan*, 36 A.D. 37, 42 (1977); *In re Mid-States Livestock, Inc.*, 37 A.D. 547, 561–562 (1977), *aff'd sub nom Van Wyk v. Bergland*, 570 F2d 702 (8th Cir. 1978); *In re C.J. Edzards, supra*. To issue nonsufficient funds checks is an unfair and deceptive trade practice under section 312(a), and since the 1976 amendments to the Packers and Stockyards Act, such failure to pay promptly and in full for livestock has also been violative of Section 409 of the Act. *In re Donald Hageman*, 42, A.D. 531, 540 (1983).

Respondent asserts that the amount remaining unpaid on the checks has been reduced from the original indebtedness of $64,000, to a balance of $39,000 and that he is continuing to make payments on his debt. (Tr. 25). This is no defense to the violations alleged, however. *In re Milton Bryan, supra*. It has been the consistent administrative construction of the Act that failure to pay promptly and in full for livestock is an unfair and deceptive practice in violation of the Act whether or not the checks are later made good. In re *Hageman, supra*.

Sanction

Complainant seeks the imposition of a five year suspension of registration and an order to cease and desist. While not an ardent proponent of severe sanctions, especially in the case of a first violation, I must agree whole heartedly with complainant's position in this proceeding.

In his answer, the respondent did not contest the factual allegations of the complaint. His sole defense is directed to the proposed sanction sought by the complainant. As stated at the oral hearing by Mr. Brinckmeyer, Chief of the Financial Protection Branch, Packers and Stockyards Administration, the Administration requests that Mr. Powell be ordered to cease and desist from the practices alleged and that he be suspended for a period of five years and thereafter until he demonstrates his solvency and complies with the bonding requirements of the Act and regulations. (Tr. 14-15). The agency acknowledges that it is seeking a lengthy and severe suspension in this case (Tr. 15).

However, in light of the nature and seriousness of the violations committed and Mr. Powell's longstanding and continued disregard of the financial requirements [1] of the Act, the sanction requested is appropriate and clearly warranted in the circumstances.

At the oral hearing, Mr. Brinckmeyer summarized the factors upon which the Agency bases its recommendation that a five-year suspension be imposed against Mr. Powell. First, the Agency takes the position that the violations committed are very serious and warrant a long suspension. (Tr. 15). Second, the sanction recommended is not a punishment for respondent's past offenses, but is a necessary deterrent to assure adherence to the provisions of the Act by respondent and other registrants. (Tr. 15–16). Third, in light of the seriousness of the violations and respondent's flagrant and chronic history of noncompliance with the Act, complainant believes that the requested suspension is the minimum sanction which can usefully serve as an effective deterrent to respondent and others (Tr. 14–16). Finally, the Agency has sought and received input from the livestock industry concerning its sanction policy and the livestock producers themselves have stated that lengthy suspensions should be imposed where buyers fail to pay for livestock (Tr. 17).

In failing to pay promptly, respondent took unfair economic advantage of his livestock seller by shifting the cost of financing his livestock purchases to this seller. Moreover, the seller has yet to receive full payment for the livestock. The livestock seller turned unwilling financier is not the only one injured, however. As Mr. Brinckmeyer testified, when one buyer fails to pay, "it can have a very strong domino effect of going back through several firms to the livestock producer." (Tr. 11). And here, where the respondent has been operating without any bond coverage, the potential for injury is particularly severe. Along the way, financially vulnerable sellers are forced out of the industry by the costs imposed by slow payment. The forced extension of credit resulting from a failure to pay promptly is also unfair to livestock buyers who comply with the law and who do not receive the competitive advantage of free financing which respondent has enjoyed.

Respondent did not commit these violations accidentally, but rather with full knowledge that the practices were prohibited by the Act He

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[1] Pages 17 and 18 of the transcript illustrate respondent's disregard of the financial requirements of the Act.

Q. Complainant's Exhibit No. 3., Mr. Brinckmeyer, contains a Decision and Order filed on April 10, 1972 which suspended Mr. Powell for thirty days and thereafter, until he demonstrates that he is no longer insolvent. To your knowledge, has the Respondent submitted a balance sheet or otherwise demonstrated his solvency subsequent to the entry of that Order?

A The Agency has had no balance sheet or other demonstration from Mr. Powell that he is presently solvent.

had already been found in previous administrative and judicial actions, to have committed similar violations. Findings 7, 8, 9.

For the foregoing reasons the sanctions requested by complainant are granted.

Order

I. Respondent William T. Powell, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations;

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which they are drawn to permit their payment upon presentation;

3. Failing to pay, when due, the full purchase price of livestock purchases; and

4. Failing to pay the full purchase price of livestock.

II. Respondent is suspended as a registrant under the Act for five (5) years and thereafter until such time as he complies fully with the bonding requirements under the Act and the regulations, and demonstrates that he is no longer insolvent. [2] When respondent demonstrates that he is in full compliance with such bonding requirements and that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension, after the expiration of the five-year period.

III This decision and order shall be final and effective 35 days after the date of service upon respondent, unless there is an appeal to the Judicial Officer within 30 days of service (pursuant to section 1.145 of the rules of practice (7 CFR § 1.145)).

IV. Copies hereof shall be served on the parties.

[This decision and order became final May 6, 1985.—Editor]

In re. DANNY COBB, CROCKETT LIVESTOCK SALES COMPANY, INC., and THOMAS W. HORNER, JR. P&S Docket No. 6587. Decision filed May 19, 1986.

Dealer—Market Agency—Failure to pay—Prohibited from engaging in business for 5 months—Default.

[2] The provisions of the Decision and Order in P.& S. Docket No. 4549, issued on April 10, 1972, remain in full force and effect. As of January 10, 1984, the respondent has failed to demonstrate his solvency.

Eric Paul, for complainant

Respondent, *pro se*.

Decision issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER WITH RESPECT TO THOMAS A. HORNER, JR., UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 et seq.), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act and the regulations issued thereunder (9 C.F.R. § 201.1 et seq.).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 et seq.) governing proceedings under the Act were personally served on respondent Thomas W. Horner, Jr.. Respondent Horner was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent Horner has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts pertaining to respondent Horner alleged in the complaint, which are admitted by respondent Horner's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1.(a) Thomas W. Horner, Jr., hereinafter referred to as respondent Horner, is an individual whose business mailing address is Route 3, Box 346A, Trenton, Tennessee 38382.

(b) Respondent Horner is, and at all times material herein was:

(1) Engaged in the business of buying livestock in commerce on a commission basis, and buying and selling livestock in commerce for his own account and the accounts of others; and

(2) A dealer and a market agency within the meaning and subject to the provisions of the Act.

2.(a) Respondent Horner, on or about July 13, 1984, purchased 53 head of cattle from Rector Auction Sale Barn in Rector, Arkansas and failed to pay, when due, the full purchase price of the cattle.

(b) As of March 6, 1985, there remained unpaid by respondent Horner $14,567.61 for such livestock purchases.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent Horner has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

Order

Respondent Thomas W. Horner, Jr., his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to pay, when due, the full purchase price for livestock; and

2. Failing to pay for livestock.

Respondent is prohibited for a period of five (5) months from engaging in business as a dealer or a market agency subject to the Act.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This decision and order became final November 4, 1986.—Editor]

In re: WAYNE H. CRITES P&S Docket No 6673. Decision filed October 17, 1986.

Dealer - Bonding requirement - Suspended as a registrant - Civil penalty - Default.

Andrew Stanton, for complainant.

Respondent, *pro se*.

Decision issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were personally served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Wayne H. Crites, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 1, Box 331, Moorefield, West Virginia 26836.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account and buying livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

2. Respondent was notified personally on June 1, 1985, that the $25,000.00 surety bond he maintained to secure the performance of his livestock obligations under the Act was terminated on May 29, 1985. Respondent was further notified that if he continued his livestock operations under the Act without providing adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Not withstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for his own account and a market agency buying livestock in commerce on a commission basis without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

Conclusions

By reason of the facts alleged in paragraph II herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

Order

Wayne H. Crites, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with

such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Two Thousand Dollars ($2,000.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This decision and order became final January 7, 1987. – Editor]

In re: TONY BOTT. P&S Docket No. 6739. Decision filed December 1, 1986.

Dealer—Bonding requirement—Civil penalty—Suspension of registration—Default.

Jory M. Hochberg, for complainant.

Respondent, pro se.

Decision issued by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Tony Bott, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 1, Paul, Idaho 83347.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of buying livestock on a commission basis in commerce, buying and selling livestock in commerce for his own account, and buying livestock in commerce as an employee or agent of the purchaser; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and to buy livestock in commerce for purposes of slaughter as an employee of Golden Valley Packers, Inc.

2. (a) On May 29, 1985, a Decision and Order Upon Admission of Facts by Reason of Default captioned *In re Tony Bott*, P. & S. Docket No. 6482, was filed by the Secretary of Agriculture. This Decision and Order required, *inter alia*, that the respondent cease and desist from engaging in any business for which bonding is required by the Act and the regulations without filing and maintaining a sufficient bond or its equivalent. This order also suspended the respondent as a registrant under the Act until such time as he is in full compliance with the bonding requirements of the Act. This Decision and Order was duly served on the respondent and became final and effective on July 10, 1985.

(b) On August 9, 1985, at the request of the respondent, a Supplemental Order was issued in P. & S. Docket No. 6482. This supplemental order stated that the respondent had registered to operate as a salaried dealer to purchase livestock for slaughter purposes only under the Act, a position for which the Act and the regulations do not require a bond or its equivalent. Accordingly, the supplemental order provided that the suspension provision of the order issued on May 29, 1985, was modified to allow respondent to operate solely as a salaried buyer to purchase livestock for purposes of slaughter only. The May 29, 1985, order remained in full force and effect in all other respects.

3. Commencing on or about September 9, 1985, and continuing until at least December 23, 1985, respondent engaged in the business of a market agency, buying livestock in commerce on a commission basis, and a dealer, buying and selling livestock in commerce for his own account, without maintaining an adequate bond or its equivalent, as required by the Act and the regulations. In connection with these operations, respondent prepared and caused to be prepared invoices, accountings, and other documentation which showed respondent purchasing livestock as an employee of Golden Valley Packers, Inc., a packer located in Roberts, Idaho, when in truth and in fact respondent was purchasing these livestock in connection with his individual livestock operations subject to the Act. The purpose and effect of respon-

dent's actions were to enable respondent to continue to buy and sell livestock in commerce for his own account and buy livestock in commerce on a commission basis without a bond or its equivalent as required by the Act and the regulations and without respondent's unlawful operations being detected.

Conclusions

By reason of the facts found in Finding of Fact 3 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

Order

Respondent Tony Bott, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act for a period of one year and thereafter until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Five Thousand Dollars ($5,000.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This decision and order became final January 16, 1987.—Editor]

In re: TAZEWELL & ASSOCIATES, INC., and JOHN R. OSWALT. P&S Docket No. 6752. Decision filed December 18, 1986.

Dealer—Insufficient funds checks—Failing to pay when due—Suspended as a registrant—Prohibited from engaging in business for five years—Default.

John J. Casey, for complainant.

Dean Essig, Washington, Illinois, for respondent.

Decision issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the complaint and Rules of Practice (7 C.F.R. § 1 130 *et seq.*) governing proceedings under the Act were served upon respondents by the Hearing Clerk by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Tazewell & Associates, Inc., hereinafter referred to as the corporate respondent, at all times material herein was a corporation organized and existing under the laws of the State of Illinois, with a principal place of business located at 136 Cedar Avenue, Morton, Illinois.

(b) The corporate respondent among other things at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for its own account as a dealer; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account.

(c) John R. Oswalt, hereinafter referred to as the individual respondent, is an individual and, at all times material herein, was the President of the corporate respondent, and residing at the same address.

(d) The individual respondent among other things at all times material herein was:

(1) Responsible for the direction, management and control of the corporate respondent; and

(2) Engaged in the business of a dealer buying and selling livestock in commerce.

2. Respondents, in connection with their business as a dealer, on or about the dates and in the transactions set forth in paragraph II of the

complaint, purchased livestock and in purported payment therefor issued checks which were returned unpaid by the bank on which they were drawn because respondents did not have sufficient funds on deposit and available in the account on which such checks were drawn to pay such checks when presented.

3. (a) On or about the dates and in the transactions set forth in paragraph II of the complaint, respondents purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(b) As of July 2, 1986, there remained unpaid by the respondents a total of at least $7,969.50 for the livestock purchases referred to in paragraph II of the complaint.

Conclusions

By reason of the facts found in Findings of Fact 2 and 3 herein, respondents have wilfully violated sections 307(a), 312(a), and 409 of the Act (7 U.S.C. §§ 208(a), 213(a), 228b).

Order

Respondents Tazewell & Associates, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, and John R. Oswalt, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Purchasing livestock and in purported payment therefor issuing checks without having sufficient funds on deposit and available in the account on which such checks are drawn to pay such checks when presented; and

2. Purchasing livestock and failing to pay when due the full purchase price of such livestock.

Respondent Tazewell & Associates, Inc., is suspended as a registrant under the Act for a period of five (5) years.

Respondent John R. Oswalt is prohibited from engaging in business in any capacity subject to the Act for a period of five (5) years, provided, however, that upon application by respondent John R. Oswalt to the Packers and Stockyards Administration, a supplemental order may be issued terminating this prohibition after 90 days, upon demonstration that all unpaid livestock sellers have been paid in full, and provided further that this prohibition may be modified upon application to the Packers and Stockyards Administration to permit respondent John R. Oswalt to be employed by a registrant, after expiration of the 90 day period.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This decision and order became final January 26, 1987.—Editor]

PACKERS AND STOCKYARDS ACT

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: BOURBON STOCK YARD COMPANY and PRODUCERS LIVESTOCK MARKETING ASSOCIATION. P & S Docket No. 6748. Order filed January 13, 1987.

Order issued by Victor W. Palmer, Administrative Law Judge.

ORDER

On motion of the Respondents, and the U. S. Department of Agriculture being duly advised, it is hereby ordered that the above-styled proceedings are dismissed in their entirety.

In re: ELMO MAYES. P&S Docket No. 6591. Order filed January 21, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER DENYING PETITION FOR RECONSIDERATION

Respondent's petition for reconsideration, which is regarded as frivolous, is denied for the reasons set forth in the Decision and Order previously filed herein on November 24, 1986.

In re: Elmo Mayes. P&S Docket No. 6591. Order filed January 28, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

STAY ORDER

The civil penalty provisions of the order previously issued in this case are hereby stayed pending the outcome of proceedings for judicial review. The cease and desist provisions shall remain in effect.

REPARATION DECISIONS

ROMAN HESSE *v.* WAGENER'S DAIRY CATTLE, INC. and KENNETH H. WAGENER. P&S Docket No. 6468. Decision filed January 7, 1987.

Jurisdiction—Absence of fraud, misrepresentation, concealment or express warranty—Improper animal husbandry—Complaint dismissed.

Where respondent contends that the Secretary has no jurisdiction to resolve this dispute, it is determined that respondent is a dealer and therefore the Secretary has jurisdiction.

Shortly after complainant purchased four cows from respondent, his dairy herd was ravaged by serious disease, resulting in substantial economic damage. However it is found that respondent did not make any express warranties when he merely repeated a representation made to him by the person from whom he originally purchased the animals regarding vaccination for disease. Therefore complainant cannot recover damages on grounds of fraud, misrepresentation, concealment or breach of an express warranty. Complainant also seeks reparation based on the theory that respondent breached an implied warranty. Although at least one of the four purchased animals displayed signs of disease, none of the four died and no part of complainants claim is for specific damages regarding these particular animals. Complainants entire claim is for consequential damages to the remainder of his herd. It is found that improper animal husbandry was the proximate cause of complainant's damages rather than any supposed breach of an implied warranty by respondent.

Therefore the complaint was dismissed.

Thomas C. Heinz, Presiding Officer.

Robert A. Nicklaus, Chaska, Minnesota, for complainant.

Paul A Melchart, Waconia, Minnesota, for respondent

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 *et seq.*), hereinafter "the Act," begun by a complaint timely filed on July 10, 1984, alleging in substance that complainant purchased from respondents four dairy cattle which were either diseased or disease carriers and which infected his dairy herd causing actual and anticipated losses of approximately $100,000.00, the amount sought as reparation. Copies of the formal complaint and the investigation report prepared by the Packers and Stockyards Administration of the Department were served on respondents.

Respondents filed a timely answer acknowledging the sale of dairy cattle to complainant, denying any responsibility for the disease problems encountered by complainant, and requesting an oral hearing. Accordingly, on May 28, 1985, an oral hearing was held in Chaska, Minnesota before Thomas C. Heinz of the Office of General Counsel of this Department. Complainant was represented by Robert A. Nicklaus of Nicklaus, Monroe, Fahey & Cooper in Chaska, Minnesota. Respondents were represented by Paul A. Melchert of Melchert, Hubert, Sjodin & Willemssen in Waconia, Minnesota. Six witnesses testified on behalf of complainant who introduced seven exhibits, and five witnesses testified for respondents who introduced four exhibits.

Briefing by the parties was completed on September 23, 1985.

Finding of Fact

1. Complainant Roman Hesse, hereinafter "Hesse", is an individual who resides at 6455 County Road 140, Cologne, Minnesota 55322. At the time of the hearing Hesse was 49 years old and had been a dairy farmer all his life.

2. Respondent Wagener's Dairy Cattle, Inc., is a corporation with its principal place of business located at 12325 County Road 30, Waconia, Minnesota 55387 where it is engaged in the business of buying and selling livestock for its own account.

3. Respondent Kenneth H. Wagener is an individual who at all times material herein was an owner and officer of the corporate respondent. The respondents hereinafter will be referred to collectively as "Wagener".

4. On April 12, 1984, Hesse purchased four head of Holstein cattle for $3,400.00 from Wagener at Wagener's place of business. Hesse and his son personally selected and inspected these four animals, none of which showed any sign of disease. No other animal on Wagener's premises exhibited disease symptoms at this time. The four head purchased by Hesse consisted of one older cow and a fresh heifer which came from a herd Wagener had purchased 19 days earlier from an individual named "Fossum," and two "springing" heifers (that is, cows nearly ready to calve) which Wagener had purchased 14 days earlier from an individual named "Collins."

5. Hesse testified Wagener represented three out of the four cows had been vaccinated for bovine virus diarrhea ("BVD") and infectious bovine rhinotracheitis ("IBR"). Wagener testified he relayed to Hesse a statement made by Collins to Wagener representing that the two cows from the Collins herd had been vaccinated for IBR and BVD, but Wagener told Hesse he did not know whether either of the cows from the Fossum herd had been vaccinated.

6. BVD and IBR are a complex of viruses normally present in every dairy herd even though no animal in the herd may be displaying any symptoms of disease. These viruses are contagious and are transmitted by bodily secretions to another animal which may become infected through the mouth, the respiratory tract, the eyes or a cut in the skin. The incubation period is normally 7 to 14 days, and if the viruses multiply sufficiently, the animal will become ill with a variety of symptoms including runny nose, labored breathing, high temperature, sore mouth, refusal to eat, lowered milk production in a dairy cow, and diarrhea, among other things. Symptoms can flare up in unprotected animals as a result of stress caused by such things as shipment from one location to another or the introduction of new animals into an existing herd.

7. The BVD virus weakens an animal's immune system, thereby making it susceptible to numerous secondary diseases, particularly pneumonia, and other health problems such as laminitis and breeding

difficulties. IBR and BVD viruses in and of themselves are not fatal. When death occurs, it is caused by pneumonia or some other disease taking advantage of the weakened immune system.

8. On April 19, 1984, one of the four cows purchased from Wagener displayed symptoms of BVD and IBR. Within a few weeks, 50% of Hesse's herd had become seriously ill. Eventually ten cows and 67 calves died of diseases apparently resulting from a BVD attack on their immune system. However, none of the animals Hesse purchased from Wagener died. Milk production declined markedly and veterinary bills escalated considerably for many months following the outbreak of disease in the Hesse dairy herd.

9. There are no commercially feasible means to determine the presence of these viruses on a routine basis in visibly healthy animals.

10. Wagener's April 12, 1984, sale of dairy cows to Hesse followed normally accepted procedures within the trade.

Subsidiary Findings and Conclusions

I.

Wagner contends that the Secretary has no jurisdiction under the Act to resolve this dispute. That contention has no merit. This reparation proceeding was initiated under section 309 of the Act which provides in part:

> (a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "Defendant") in violation of the provisions of sections 304, 305, 306, or 307, or of an order of the Secretary made under this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary....
>
> (e) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

Although Wagener correctly argues that in order for the Secretary to have jurisdiction to issue a reparation order, a respondent must be found to have violated some provision of sections 304, 305, 306 or 307 of the Act (7 U.S.C. §§ 205, 206, 207, 208) or an order of the Secretary, Wagener incorrectly concludes that none of the cited sections apply in the instant case because the jurisdictional reach of these sections is limited to market agencies and stockyards, and Wagener is neither. Wagener is engaged in the business of buying and selling livestock for its own account, that is, Wagener is a "dealer" as defined in the Act (7 U.S.C. § 201(d)). For nearly 40 years we have consistently held that

jurisdiction to issue a reparation order a[illegible] 307(a) of the Act (7 U.S C. § 208(a)), specifically [illegible] that provision which states that "every unjust, [illegible] criminatory regulation or practice is prohibited a[illegible] lawful." *See, e.g., Independent Order Buying* [illegible] *well* 6 Agric Dec. 527 (1947); *Scannell-Cohran* [illegible] *v. O. J. Jones and W. H. May Clearing Age*[illegible] (1950); *Vance v. Reed*, 38 Agric. Dec. 418 (19[illegible]

This interpretation of the Act has been affirme[illegible] Court of Appeals in *Rice v. Wilcox*, 630 F.2d 58[illegible] thorough discussion of the statute, its legislative h[illegible] cases, the court concluded its analysis of the juri[illegible] section 307 with the following statement at page [illegible]

> [W]e hold the Secretary is not confined to "un[illegible] able, or discriminatory" regulations or pra[illegible] only with *stockyard* services, but rather he h[illegible] deal with "every unjust, unreasonable, or d[illegible] lation or practice" involved in the marketing of [illegible] hold otherwise would retreat from the statute's re[illegible] purpose. [Emphasis in original]

In short, section 307 of the Act confers jurisdict[illegible] to award damages caused by any practice that [illegible] livestock, whether committed by stockyards, marke[illegible] ers, and since Wagener is a dealer, the Secretar[illegible] issue a reparation order against that firm

II

There is no doubt that shortly after Hesse purcha[illegible] Wagener his dairy herd was ravaged by serious d[illegible] substantial economic damage. The question is whether Wage[illegible] mitted an unjust, unreasonable or discriminatory pra[illegible] section 307 of the Act which caused that economic [illegible] reparation may be awarded. Upon a careful an[illegible] and the arguments of the parties, we conclude that Wagener [illegible] violated the Act, and the complaint must be dismissed.

We have long held that absent fraud, misrepresen[illegible] ment, or an express warranty, when title passes to a [illegible] does the risk of loss. *See*, e.g., *Preston* v. *Melcot* [illegible] Dec. 1543 (1975); *Kirkpatrick* v. *Templeton Sales* [illegible] 639 (1974); *Midwest Livestock* v. *V. J. Burds*, 32 Agric. [illegible] (1973); *Kavon v. Cherrier*, 30 Agric. Dec. 784 (1971); *Fie*[illegible] *vis and Randall*, 29 Agric. Dec 694 (1970). *See* [illegible] *Sales Pav. et al*, 22 Agric. Dec. 1112 (1963). Title pass[illegible] fer of possession. Uniform Commercial Code § 2-4[illegible] *Sales v. Noll*, 28 Agric Dec. 1011, 1016 (1969), *Stevens Brothers* [illegible] *Inland Empire Livestock*, 23 Agric. 467 (1964). [illegible] this case most favorably to Hesse, the most that can [illegible]

April 12, 1984, Wagener represented that two or three out of the four cows Hesse purchased on that day had been vaccinated for IBR and BVD; that seven days later on April 19, 1984, one of the four displayed symptoms consistent with IBR and BVD; that similar disease symptoms thereafter spread throughout the herd; that expert veterinarians have concluded the Hesse herd suffered from IBR and BVD, and finally, that some experts believe on the basis of these and other facts that the disease originated with the Wagener cows (although other expert opinion disputes the conclusion that the disease came into the herd via the Wagener cows). Even if we were to assume, *arguendo*, that the cows purchased from Wagener were in fact responsible for the contagion, it does not follow that Wagener engaged in any fraud, misrepresentation or concealment in connection with this case.

Wagener's statement regarding vaccination of the Collins cows merely repeated a representation made to Wagener by Collins. Since Wagener was not shown to have been in possession of any information regarding the vaccinations different from that relayed to Hesse, Wagener cannot have engaged in any fraud, misrepresentation or concealment. Even Hesse concedes Wagener's statements were made innocently.

But Hesse argues a "representation of vaccination . . . conveys the assurance of immunity." (Reply Brief, page 4). On the contrary, expert testimony in the record clearly shows that vaccination for IBR and BVD is only about 80% effective, that is, 20% of vaccinated animals are not protected against it. Further, some animals can be carriers of the disease even though they have been vaccinated and will not become ill themselves. Hesse has misunderstood the meaning of vaccination for IBR and BVD. By repeating a statement made by Collins regarding vaccinations, Wagener did not thereby explicitly or implicitly guarantee that these four animals would not become sick or that they would not transmit any disease to Hesse's herd. Wagener made no representations about the health of these animals, past, present or future. In other words, Wagener made no express warranties in connection with this transaction.

All four of the experts who testified at hearing agreed that vaccination does not guarantee immunity, Hesse's understanding to the contrary notwithstanding. Furthermore, Hesse mistakenly argues that Minnesota courts have held that when a livestock seller says an animal has been vaccinated, that statement constitutes a warranty that the animal is free from disease. In *Bemidji Sales Barn, Inc. v. Chatfield*, 312 Minn. 11, 250 N.W. 2d 185 (1977), the principal case cited by Hesse, the court found the seller had breached an *express warranty* by representing that breeding cattle "had been vaccinated for shipping fever and *were ready for the farm*," when in fact the cattle had been vaccinated only the day before the sale and were not ready for the farm

because at least two weeks are necessary to develop adequate immunity after vaccination. (Emphasis supplied)

In the instant case, since the Collins cows Hesse purchased from Wagener had been on Wagener's premises for at least two weeks at the time of Hesse's purchase, they had developed whatever immunity they were going to develop if they in fact had been vaccinated before Wagener purchased them. [1] The *Bemidji* case therefore provides no aid to Hesse's cause, nor does any other case cited by Hesse stand for the proposition that when a livestock seller tells a buyer that animals have been vaccinated, that statement, standing alone, amounts to a guarantee that the animals are disease-free.

In short, Hesse cannot recover on grounds of misrepresentation, fraud, concealment, or breach of an express warranty. However, Hesse also seeks reparation on the theory that Wagener has breached an implied warranty. While there is no precedent for a reparation award under the Act based on breach of an implied warranty, even if we were to assume (without deciding) that reparation may be ordered on that basis, recovery nevertheless could not be awarded in this case.

Although at least one of the four Wagener cows displayed some signs of the IBR and BVD complex within a week of purchase, none of the four died, and no part of Hesse's claim is for direct or specific damages regarding those four cows. His entire claim is for consequential damages to the remainder of his herd. A buyer may recover only those consequential damages proximately caused by a breach of warranty; he may not recover for those consequential damages caused by his own negligence or fault. *Signal Oil and Gas Co. v. Universal Oil Products*, 572 S.W. 2d 320, (Tex. 1978). Put otherwise, contributory negligence is a defense to breach of warranty actions insofar as consequential damages are concerned. *Peterson v. Bendix Home Systems, Inc.*, 318 N.W. 2d 50, 53 (Minn. 1982); *Moonsbrugger v. McGraw-Edison Co.*, 170 N.W. 2d 72 (Minn. 1969). *See*, also, UCC § 2-715, note 4a.

For two years previous to Hesse's purchase of the four cows from Wagener, he had maintained a closed herd, that is, no animal had been brought into the herd from outside. For 10 to 15 years previous to the purchase, Hesse had been advised annually by his veterinarian to vaccinate his herd against IBR and BVD, a precaution commonly taken by dairy farmers. He did not do so even though the cost would have

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[1] Hesse purchased the two Collins animals on April 12, 1984, and the Collins herd had been on Wagener's premises since March 29, 1984. Before they were delivered to Hesse on April 13, 1984, Wagener's veterinarian also gave the cows "Naselgen", an intranasally administered vaccine for IBR which is less effective than the intramuscularly administered variety. The Naselgen inoculation is not material to this controversy.

been minimal.[2] His herd was therefore completely vulnerable to an outbreak of IBR and BVD. In spite of the risk, Hesse knowingly purchased and introduced into his herd at least one and possibly two animals which may not have been vaccinated without isolating them for a period of time to insure they were disease-free or vaccinating them himself. If he had vaccinated the newly purchased cows and isolated them away from the rest of his herd for at least two weeks, long enough to allow either immunity to develop or disease symptoms to appear, he could have prevented IBR and BVD from running rampant throughout his herd with the resulting lowered milk production, various and sundry secondary diseases, and death (assuming the Wagener cows were the source of the problems). Whether or not one or more of the Wagener cows was in fact infected with IBR and BVD, Hesse would not have suffered the problems which led to this complaint if he had maintained a vaccination program. In sum, improper animal husbandry was the proximate cause of Hesse's damages rather than any supposed breach of an implied warranty by Wagener.[3]

The major share of the record in this case addresses the causation issue, that is, the question whether or not the four cows purchased from Wagener were the source of the disease problems experienced by the Hesse dairy herd. Given our disposition of the case, it is not necessary to resolve that argument and specifically determine the origin of the contagion.[4] Whether or not the IBR and BVD disease complex was introduced into the Hesse herd through the Wagener cows, Hesse's damages were the result of his own negligence or fault. Hence, no reparation may be awarded, and the complaint must be dismissed.

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[2] A vaccination program could have been maintained at a cost of less than $2.00 per head. Although vaccination does not guarantee 100% freedom from disease, it is the most effective preventive measure available. Once these diseases gain a foothold, only the symptoms can be treated.

[3] The trial court in the *Bemidji* case, *supra*, also rejected the livestock buyer's claim based upon an alleged breach of an implied warranty of merchantability. The Minnesota appellate court in that case observed that the buyer had failed to separate the sick animals from the healthy, thereby facilitating the spread of a highly contagious disease to the rest of the herd. The appellate court therefore concluded at least some of the cattle deaths suffered by the buyer were caused by his own improper animal husbandry.

[4] It is, however, appropriate to note that since serology or other laboratory tests apparently were not conducted on the four cows purchased from Wagener to determine the presence of IBR and BVD viruses, conclusive evidence is not available on this point. Both sides of the argument rely on circumstantial evidence and expert opinion.

Order

The complaint is hereby dismissed.

Copies hereof shall be served upon the parties.

CENTRAL TEXAS CATTLE CO., INC. *v.* CLOVIS LIVESTOCK AUCTION MARKET, INC. P&S Docket No. 6596. Order filed January 15, 1987.

Order issued by Donald A. Campbell, Judical Officer.

ORDER OF DISMISSAL

By letter filed December 24, 1986, the complainant, through its attorney, notified this tribunal "that the issues in this proceeding have (been) fully settled between the parties." Therefore, this proceeding should be dismissed.

Order

This proceeding is dismissed.

Copies of this Order shall be served on the parties.

PACKERS AND STOCKYARDS ACT

COURT DECISIONS

CLYDE A. ZIMMERMAN and RICHARD ZIMMERMAN, Petitioners, *v.* JAMES C. HANDLEY, ADMINISTRATOR, DEPARTMENT OF AGRICULTURE, et al. Number 85-1266. Decided April 21, 1986.

Responsibly connected persons.

The U.S. Court of Appeals, Eighth Circuit, affirmed an order issued by the Administrator of the Agricultural Marketing Service, U.S. Department of Agriculture, October 4, 1985. This order suspended petitioners' license, which had been issued under the Perishable Agricultural Commodities Act, because petitioners were found to be responsibly connected with a company whose license had been revoked for cause.

UNITED STATES SUPREME COURT

Case below, *Zimmerman v. Manley,* 782 F.2d 1047.

Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

April 21, 1986. Denied.

CLYDE A. ZIMMERMAN, et al, Petitioners *v.* WILLIAM T. MANLEY, et al, Respondents. Case Number 84-2433. Judgment filed October 4, 1985.

Responsibly connected persons.

Brokers' licenses issued under the Perishable Agricultural Commodities Act were suspended by an order issued by the Administrator of the Agricultural Marketing Service, U.S Department of Agriculture, because they were found to be responsibly connected with a company whose license had been revoked for cause. Such action was supported by the evidence of record. Therefore, the order was affirmed by the Court.

UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

Petition for Review of Order of U.S. Department of Agriculture, Agricultural Marketing Service.

Judgment

This case came to be submitted on the petition for review of an order of the U.S. Department of Agriculture, administrative record, briefs of the respective parties and was argued by counsel.

Upon full consideration of the premises it is hereby adjudged and decreed that the order of the U.S. Department of Agriculture is affirmed in accordance with the opinion of this Court. See Cir. R. 14.

NUNCIO J. MARTINO, Petitioner, *v.* UNITED STATES DEPARTMENT OF AGRICULTURE and UNITED STATES OF AMERICA, Respondents. Case Number 84-1427. HILMER J. SCHMIDT, Petitioner, *v.* UNITED STATES DEPARTMENT OF AGRICULTURE and UNITED STATES OF AMERICA, Respondents. Case Number 84-1476. Decided September 30, 1986.

Responsibly connected persons.

Petitioners were temporarily barred from employment by any licensee under the Perishable Agricultural Commodities Act in orders issued by the Administrator, Agricultural Marketing Service, U.S. Department of Agriculture. A presiding hearing officer had found that the petitioners were responsibly connected, through stock ownership, to a licensee who had flagrantly and repeatedly violated the Act. The Court found that the record amply supported these findings and, accordingly, affirmed the Department's determinations.

Edward M. Ruckert, Robert H. Myers, Jr., and *Carole Stern*, for petitioners.

Aaron B. Kahn, James Michael Kelly, and *Raymond W. Fullerton*, Office of General Counsel, U.S. Department of Agriculture, for respondents.

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

Before ROBINSON and BORK, Circuit Judges, and WRIGHT, Senior Circuit Judge.

Opinion for the Court filed by SPOTTSWOOD W. ROBINSON, III, Circuit Judge:

Petitioners attack orders of the Administrator of the Agricultural Marketing Service of the Department of Agriculture [1] temporarily debarring them from employment by any licensee under the Perishable Agricultural Commodities Act. [2] The orders rest on findings by a presiding hearing officer that Tomatoes, Inc., a licensee, had flagrantly and repeatedly violated the Act, and that petitioners had been "responsibly connected" because each owned more than ten percent of the licensee's stock. [3] Our review discloses that the administrative record amply supports these determinations, and accordingly we affirm.

I. THE REGULATORY BAN

The Perishable Agriculture Commodities Act, which has undergone

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[1] *Nuncio J. Martino*, PACA-RC-82-1006 (June 19,1984) (final order), reproduced in Petitioner's Appendix (P.App.) F; *Hilmer C. Schmidt*, PACA-RC-82-1035 (July 23, 1984) (final order), reproduced in P.App.G.

[2] Ch. 436, § 1, 46 Stat 531 (1930) (codified as amended at 7 U.S.C. § 499a *et seq.* (1982)) [hereinafter cited as codified].

multiple amendments since its original passage in 1930, [4] is crafted meticulously to suppress unfair practices in the industry. [5] The section applicable here enables the Secretary of Agriculture to bar from employment therein, for varying periods of time, not only those who are direct violators of the Act but also those who are or have been "responsibly connected with" such violators. [6]

The Act defines "responsibly connected" as "affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or a holder of more than 10 per centum of the outstanding stock of a corporation or association." [7] As this court has noted, " '[t]he Perishable Agricultural Commodities Act is admittedly and intentionally a "tough" law.' " [8] By the terms of the Act, once a person is found to be a bona fide partner, officer, director, or ten-percent or larger shareholder of a sanctioned company, he is

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[3] *Tomatoes, Inc.*, PACA Dkt. No. 2-5921 (Nov. 1, 1982) (decision and order) at 2, reproduced in Respondent's Appendix (R App.) 19-A; *Nuncio J. Martino*, PACA-RC-82-1006 (Jan. 13, 1984) (decision) at 2-4, 11, reproduced in P.App.D [hereinafter cited as *Martino Decision*]: *Hilmer C. Schmidt*, PACA-RC-82-1035 (Apr. 27, 1984) (decision) at 2-4, 15, reproduced in P.App.E [hereinafter cited as *Schmidt Decision*]. Allegedly, Martino also served as a director of the company, see Brief for Respondent at 3 n. 6; *Martino Decision*, *supra*, at 11, but we need consider only his role as stockholder.

[4] See Act of Apr. 13, 1934, ch. 120, 48 Stat. 584; Act of Aug. 30, 1937, ch. 719, 50 Stat. 725; Act of June 29, 1940, ch. 456, 54 Stat. 696; Pub.L. No. 87-725, 76 Stat. 673 (1962); Pub.L. No. 91-107, 83 Stat. 182 (1969); Pub .L. 95-562, 92 Stat. 2381 (1978).

[5] Since the history of the Act is canvassed in *Quinn v. Butz*, 166 U.S.App.D.C. 363, 365-366, 373-375, 510 F 2d 743, 745-746, 753-755 (1975), it is not repeated here. See also *Birkenfield v. United States*, 369 F.2d 491, 494 (3rd Cir.1966); *Puplito v. United States*, 755 F.2d 638, 643-644 (8th Cir.1985).

[6] 7 U S.C. § 499h(b)(1982), providing in relevant part:

> Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—
>
> (1) whose license has been revoked or is currently suspended by order of the Secretary;
>
> (2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title . . .; or
>
> (3) against whom there is an unpaid reparation award issued within two years. . . .

[7] U.S.C. § 499a(9) (1982).

[8] *Finer Foods Sales Co. v. Block*, 228 U.S.App.D.C. 205, 212, 708 F.2d 774, 781 (1983) (quoting S.Rep. No. 2507, 84th Cong., 2d Sess. (1956)), *reprinted in* 1956 U.S. Code Cong. & Ad.News 3699, 3701.

completely foreclosed from employment in the industry for at least one year, [9] whether or not he participated personally in the violation. [10]

II. THE FACTUAL BACKGROUND

Petitioner Martino is vice-president and general manager of Northside Banana, a licensee operating a wholesale fresh fruit and vegetable business, where he has worked for 22 years. [11] Petitioner Schmidt owns 98 per-cent of the stock of Northside Banana. [12] In 1978, petitioners assisted a longtime friend, John D. Madera, in forming a new produce company,[13] Tomatoes, Inc., which was incorporated on September 5 of that year. [14] Martino and Schmidt each owned 2,000, or 22.2 percent, of the 9,000 shares of stock issued by Tomatoes, Inc. [15]

Subsequently, between September, 1980, and May, 1981, Tomatoes, Inc. purchased 45 lots of tomatoes from ten sellers, but failed to pay the $372,481.21 owing. [16] Tomatoes, Inc. consented to issuance of an order finding that these violations of the Act were "willful, repeated and flagrant," and revoking its license on November 1, 1982. [17]

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[9] The Secretary may approve employment after one year upon the posting of a bond, of after two years without bond. 7 U.S.C. § 499h(b) (1982).

[10] S.Rep. No. 750, 87th Cong., 1st Sess. 4-5 (1961); H.R.Rep No. 1546, 87th Cong., 2d Sess. 6 (1962), *reprinted in* 1962 U.S. Code Cong. & Ad.News 2749, 2753. See *Quinn v. Butz supra* note 5, 166 U.S.App.D.C at 376 n. 84, 510 F.2d at 756 n. 84; *George Steinberg & Son, Inc., v. Butz* 491 F.2d 988, 994, (2d Cir.), *cert. denied*, 419 U.S. 830, 95 S.Ct. 53, 42 L.Ed.2d 55 (1974); *Zwick v. Freeman*, 373 F.2d 110, 118, (2d Cir.), *cert. denied*, 389 U S. 835, 88 S.Ct 43, 19 L.Ed.2d 96 (1967); *Birkenfield v. United States, supra* note 5, 369 F.2d at 493; *Pupillo v. United States*, supra note 5, 755 F.2d at 643-644.

[11] Transcript of hearing (Tr.), *Nuncio J. Martino*, PACA-RC-82-1006 (June 15, 1983) 82-83 [hereinafter cited as Martino Hearing].

[12] Transcript of hearing (Tr.), *Hilmer C. Schmidt*, PACA-RC-82-1035 (June 15, 1983) 82-85 [hereinafter cited as Schmidt Hearing].

[13] Martino Hearing, *supra* note 11, Tr. 7-9, 32, 35-36, 61, 84 101-103, 111-112; Schmidt Hearing, *supra* note 12, Tr. 85-87, 91-93, 101-103. This help included aid in finding an attorney, obtaining financing, and preparing paperwork. *Id.*

[14] R.App. 1A; Martino Hearing, *supra* note 11, Tr. 9-10.

[15] *Martino Decision, supra* note 3, at 2-4, 11; *Schmidt Decision, supra* note 3, at 2-4, 15. The finding on stock ownership was firmly supported by the evidence, see *Minotto v. Department of Agriculture*, 229 U.S.App.D.C. 128, 129 n. 3, 711 F.2d 406, 407 n. 3 (1983); *Pupillo v. United States, supra* note 5, 755 F.2d at 643, and was conceded by petitioners at oral argument.

[16] Complaint, *Tomatoes, Inc.*, PACA Dkt. No. 2-5921 (filed Jan. 20, 1982) at 2-4, R.App. 11A-13A.

[17] *Tomatoes, Inc., supra* note 3, (decision and order) at 2, R.App. 19A.

In the meantime, the Chief of the Regulatory Branch of the Agricultural Marketing Service's Fruit and Vegetable Division notified petitioners that departmental records showed that they were responsibly connected with Tomatoes Inc. [18] Pursuant to Department of Agriculture regulations, [19] each petitioner requested and was afforded a hearing before a designated presiding officer on the question whether he was in fact so connected. [20] The presiding officer found against both petitioners, [21] and on their appeals the Administrator of the Agricultural Marketing Service summarily affirmed without opinion. [22] These petitions for review ensued.

III. PROCEDURAL CHALLENGES

Petitioners have three procedural quibbles with the administrative decisionmaking process leading to their debarment. These may be disposed in short order.

First, petitioners quarrel with the Administrator's summary affirmances of the decisions of the presiding officer. [23] Where, as here, a hearing officer has clearly stated the basis for error-free conclusions, the agency is at liberty to adopt his report as its own. [24]

Second, petitioners make the argument that the Administrator's failure to recite that he reviewed the entire record renders the debarment orders void. [25] Even leaving aside the question whether the formal adjudication procedures of the Administrative Procedures Act [26] apply to proceedings under the Perishable Agricultural Commodities Act—which does not expressly require an on-the-record hearing, or indeed any hearing, on the question of responsible connection [27]—we must

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[18] Letter from J.J Gardner to Nuncio J Martino (Jan 22, 1982), R App. 8A, Letter from J J. Gardner to Hilmer C. Schmidt (Sept 27, 1982), R App 27A.

[19] 7 C.F.R §§ 47.47-47.68 (1986).

[20] See Martino Hearing, *supra* note 11; Schmidt Hearing, *supra* note 12.

[21] *Martino Decision*, *supra* note 3, at 12; *Schmidt Decision*, *supra* note 3, at 16

[22] *Nuncio J Martino*, *supra* note 1, *Hilmer C. Schmidt*, *supra* note 1.

[23] Brief for Petitioners at 30-31. See note 1 *supra* and accompanying text.

[24] *Illinois v. ICC*, 698 F.2d 868, 872 (7th Cir. 1983); *Trailways v United States*, 235 F.Supp. 509, 512 (D.D.C.1964) (three-judge court)

[25] Brief for Petitioners at 32-33. See text *supra* at note 22.

[26] 5 U.S C. §§ 554, 556 (1982).

[27] *Minotto v. Department of Agriculture*, *supra* note 15, 229 U.S App.D C. at 129 n. 3, 711 F.2d at 407 n. 3. See *Izaak Walton League v. Marsh*, 210 U.S.App.D.C. 233, 248-249 n. 37, 655 F.2d 346, 361-362 n. 37, *cert. denied*, 454 U.S 1092, 102 S.Ct. 657, 70 L Ed.2d 630 (1981); *Association of Nat'l Advertisers v. FTC*, 201 U.S.App.D.C. 165, 174-175 & n. 17, 627 F 2d 1151, 1160-1161 & n. 17 (1979), *cert. denied*, 447 U S. 921, 100 S.Ct. 3011, 65 L.Ed .2d 1113 (1980).

accord the Administrator a presumption of administrative regularity. [28] And any lack of a formal motion defining the record was harmless error. [29]

Finally, petitioners claim that the presiding officer was under the control of the chief of the Regulatory Branch of the Fruit and Vegetable Division. [30] This charge is denied by the agency, [31] and is devoid of any record support whatsoever. We deem it utterly lacking in merit.

IV. RESPONSIBLE CONNECTION

Petitioners would extract from our earlier decisions a right to challenge broadly the statutory conclusion that a ten-percent or larger stockholder is "responsibly connected." Our holdings, on the contrary, offer only a narrow opportunity, which petitioners have already been afforded, to contest the operation of the statute in this respect.

The standard applicable was enunciated a decade ago in our decision in *Quinn v. Butz*. [32] Quinn was an employee of Devita Fruit Company for eight years of its existence as a sole proprietorship, and at his employer's request upon eventual incorporation of the company became its vice-president nominally in order that it might meet a requirement of state law. [33] Later, the company was found to have repeatedly and flagrantly violated the Act. The Secretary, denying Quinn a hearing and refusing to consider his proffer of evidence that the company was a corporation only fictionally and that he was vice-president only nominally, found him to be responsibly connected. [34] We held that the Act's provisions on responsible connection established, not an incontrovertible rule, but rather a rebuttable presumption subject to override by evidence. [35] We accordingly remanded the case to the Secretary with instruction to afford Quinn the opportunity to show that Devita Fruit Company was not a corporation within the meaning of the Act and that he was not an officer in any real sense of the word. [36] We expressly acknowledge, however, that had Quinn been a genuine rather than purely nominal officer of a true rather than a fictional corporation, he would have been responsibly connected. [37]

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28 *E.g.*, *FTC v. Owens-Corning Fiberglas Corp.*, 200 U S.App.D.C. 102, 111, 626 F.2d 966, 975 (1980)

29 *Pupillo v. United States*, *supra* note 10, 755 F.2d at 645.

30 Brief for Petitioners at 33-35.

31 Brief for Respondents at 23 n. 11.

32 *Supra* note 5.

33 166 U.S.App.D.C. at 367, 510 F.2d at 747.

34 *Id.* at 369-370, 510 F.2d at 749-750.

35 *Id.* at 371-376, 510 F.2d at 751-756.

36 *Id.* at 366, 370, 510 F.2d at 756, 760.

37 *Id.* at 366 n. 84, 510 F.2d at 756 n. 84.

Similarly, *Minotto v. Department of Agriculture* [38] concerned a clerical employee who, like Quinn, was made a nominal director at her corporate employer's request and for its convenience. [39] While Minotto had been afforded the hearing denied in *Quinn*, we rejected an administrative holding that she was responsibly connected, noting that "[t]he finding that an individual was 'responsibly connected' must be based upon evidence of an actual, significant nexus with the violating company." [40] Like *Quinn*, *Minotto* emphasized that its conclusion depended upon the determination that Minotto's status as a director was only nominal. [41]

We face a vastly different situation here. Unlike Quinn and Minotto, both petitioners clearly have "an actual, significant nexus with the violating company," [42] and thus fall within one of the statutory categories of responsibly connected persons. Both hold 22.2 percent of the stock of Tomatoes, Inc.; unlike Quinn and Minotto, neither was enticed or coerced by an employer into the position that renders him "responsibly connected." [43] Absent inveiglement of that sort,

> [s]urely[] the relationships of director, officer or substantial shareholder form a sufficient nexus for the arbitrary conclusion of responsible connection. Moreover, the formation of such relationships with the sanctioned company is a voluntary act. The fact that an individual has not exercised "real" authority in the sanctioned company is not controlling: certainly the individual could have resigned as an officer and director and disposed of his stock. It was his free choice not to do so. Having made that choice, the appellant[s] assumed the burdens imposed by the Act. [44]

And each petitioner has had the opportunity—denied in *Quinn*—to demonstrate that somehow he does not belong in any of the statutory categories of responsible connection, [45] and neither has done so. Since

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[38] *Supra* note 15.

[39] 229 U.S.App.D C. at 130, 711 F.2d at 408.

[40] *Id.* at 130-131, 711 F.2d at 408-409.

[41] *Id.* at 131, 711 F.2d at 409. We note that the Eighth Circuit in *Pupillo*, like petitioners, misread this aspect of *Minotto*. See *Pupillo v. United States*, *supra* note 5, 755 F.2d at 643-644.

[42] *Minotto v. Department of Agriculture*, *supra* note 15, 229 U.S.App.D C. at 131, 711 F.2d at 409.

[43] Compare *Minotto v. Department of Agriculture*, *supra* note 15, 229 U.S.App.D.C. at 131, 711 F.2d at 409; *Quinn v. Butz*, *supra* note 5, 166 U S.App.D.C. at 367, 510 F.2d at 747.

[44] *Birkenfield v. United States*, *supra* note 5, 369 F.2d at 494-495. See also *Pupillo v. United States*, *supra* note 5, 755 F.2d at 644.

[45] Martino Hearing, *supra* note 11; Schmidt Hearing, *supra* note 12, see 7 C.F.R. §§ 47.47-47.68 (1986).

petitioners have properly been found to be bona fide holders of more than ten percent of the stock of Tomatoes, Inc., the conclusion that they were reasonably connected with that corporation must stand [48]

The orders finding petitioners to be "responsibly connected" with Tomatoes, Inc., and therefore subject to the sanctions of the Act, are accordingly

Affirmed.

DISCIPLINARY DECISIONS

In re: FAVA & COMPANY, INC. PACA Docket No. 2-6547 Ruling filed December 4, 1984.

Bankruptcy petition indicates admission of amounts owed—Failure to pay substantial sums over a period of time constitutes willful, flagrant and repeated violations—Determination to be made whether sellers expressly agreed to waive payment within ten days.

The Judicial Officer ruled on a question certified by Administrative Law Judge Dorothea A. Baker that although respondent denies that it owes the amount of money alleged in the complaint, respondent's Chapter 11 bankruptcy petition, of which official notice should be taken, admits that it owes most of the sums alleged Hence there is no substantial dispute as to the amount owed. Respondent's denial that the violations were willful, flagrant and repeated is immaterial since the failure to pay such substantial sums of money in so many transactions over a six month period constitutes willful, flagrant and repeated violations, as a matter of law. But a finding of willfulness should not be made since no license would be revoked. Respondent contends that express agreements were entered into with various sellers waiving payment within ten days. The Administrative Law Judge should determine, through a prehearing conference, whether respondent contends that the sellers had expressly waived payment for more that fifteen months, *i.e.*, so that payment is not

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[48] Petitioners argue that the presiding officer was bound to consider separately whether Tomatoes, Inc. was a bona fide corporation. Brief for Petitioners at 11-15, 21-22. Not only was its corporate status explicit in the presiding officer's description of Tomatoes, Inc as "a Texas corporation," *Martino Decision*, *supra* note 3, at 2; *Schmidt Decision*, *supra* note 3, at 2, and implicit in his finding that both Martino and Schmidt were corporate stockholders, *Martino Decision*, *supra* note 3, at 2-4, 15, but independently it is clearly supported by the record, see, e g., Articles of Incorporation of Tomatoes, Inc. (filed Sept. 5, 1978), R.App. 1A; Martino Hearing, *supra* note 11, Tr 7-10. Moreover, petitioners had the opportunity to unmask Tomatoes, Inc and reveal its true character as something other than a genuine corporation, compare *Quinn v. Butz*, *supra* note 5, 166 U.S.App.D.C. at 376-380, 510 F 2d at 766-770, but failed to do so. *Quinn* required no more than that petitioners receive "an opportunity to show that the company was not in truth a corporation within the objective that Congress contemplated," 166 U.S.App.D.C at 380, 510 F 2d at 770 (footnote omitted), and that standard was plainly met here.

due even at the present time. To warrant a hearing, enough sellers would have had to enter into such express agreements for delayed payment so that the amount presently due and unpaid would be *de minimis*, *e.g.*, less than $5,000

Question certified by *Dorothea A. Baker, Administrative Law Judge.*

Ruling and order issued by Donald A. Campbell, Judicial Officer.

RULING ON CERTIFIED QUESTION

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Administrative Law Judge Dorothea A. Baker certified to the Judicial Officer the question as to whether complainant is entitled to a decision without further proceedings.

The complaint alleges that during the period February 1983 through August 1983, respondent violated § 2(4) of the Act (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 25 sellers of the agreed purchase prices, or balances thereof, in the total amount of $368,574.97, for 80 lots of perishable agricultural commodities, purchased, received and accepted in interstate and foreign commerce. The total amount alleged to be past due and unpaid is $368,564.97.[1]

Although respondent denies that it owes the amount of money alleged, respondent's Chapter 11 bankruptcy petition, of which official notice should be taken, admits that it owes the sums alleged, except for about $25,000. Hence the sums owed are substantially undisputed.

Respondent denies that the violations were willful, flagrant and repeated, but the failure to pay such substantial sums of money in so many transactions over a 6-month period would, as a matter of law, be willful, flagrant and repeated. *In re Produce Brokers, Inc.*, 41 Agric. Dec. 2247, 2247-49 (1982). However, here, as in *Produce Brokers*, a finding of willfulness should not be made since no license would be revoked (41 Agric. Dec. at 2248-49).

Respondent raises four affirmative defenses, but they are so obviously meritless that no discussion by the Judicial Officer is necessary as to them at this time.

The only issue raised by respondent that could even theoretically require a hearing is respondent's contention that "express agreements were entered into with various sellers waiving payment within ten days" (Memorandum filed September 10, 1984, at 2). To constitute a defense, it would not be enough for respondent to show merely that various sellers had expressly waived payment within 10 days, but, rather, respondent must show that the sellers expressly agreed to waive payment for more than 15 months, *i.e.*, so that payment is not due under the express agreements even at the present time. Furthermore, respondent would have to show that such express agreements were entered

[1] Presumably the $10 difference is a typographical error.

into at the time the contracts were made.[2] Finally, enough of the sellers would have had to enter into such express agreements for such delayed payment so that the amount presently due and unpaid would be *de minimis*, *e.g.*, less than $5,000.

Since it is so highly unlikely that the sellers expressly agreed, at the time the contracts were made, that they would not be paid for more than 15 months, *i.e.*, even up to the present time, the Administrative Law Judge should promptly ascertain through the prehearing conference procedure (7 C.F.R. § 1.140) whether respondent makes such a claim. (A telephone conference should resolve this simple matter.) Unless respondent shows that there is a substantial issue arising from express agreements for delayed payment, the Administrative Law Judge should issue a decision without a hearing in this proceeding.

Order

This proceeding is remanded to the Administrative Law Judge for further proceedings consistent with the views expressed in this ruling.

In re: TRI-STATE FRUIT & VEGETABLE, INC. PACA Docket No. 6619. Ruling filed December 4, 1984.

Sufficient violations not admitted to permit issuing decision without further proceedings—Determination to be made whether more than *de minimis* amount is owed—Immaterial how license lapsed or was surrendered—Violations were willful, flagrant and repeated, as a matter of law.

The Judicial Officer ruled on a question certified by Administrative Law Judge Dorothea A. Baker that respondent's answer does not admit sufficient violations to permit a decision without further proceedings. However, the Administrative Law Judge should determine through a prehearing conference whether respondent admits owing more than a *de minimis* amount for produce, in which case a hearing would not be necessary. Respondent's denial that its license terminated when it failed to pay the required fee is immaterial since respondent admits that its license was surrendered. Respondent denies that the violations were willful, flagrant and repeated, but if respondent failed to pay substantial sums of money in many transactions over a 7-month period the violations would, as a matter of law, be willful, flagrant and repeated. Nonetheless, a finding of willfulness should not be made since no license would be revoked. [Only a finding would be made that respondent had committed repeated and flagrant violations]

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[2] 7 C.F.R. § 46 2(aa)(9); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118 (Jan. 27, 1984); *In re Connecticut Celery Co.*, 40 Agric. Dec 1131, 1137-38 (1981); *In re American Fruit Purveyors, Inc.*, 38 Agric Dec. 1372, 1382 (1979), *aff'd per curiam*, 630 F.2d 370, 373 (5th Cir 1980), *cert. denied*, 450 U.S 997 (1981); *In re M&H Produce Co., 34 Agric. Dec. 700, 743 (1975), aff'd, 549 F.2d* 830 (D.C. Cir.), *cert. denied*, 434 U.S. 930 (1977).

Question certified by *Dorothea A. Baker, Administrative Law Judge.*

Ruling and order by Donald A. Campbell, Judicial Officer.

RULING ON CERTIFIED QUESTION

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Administrative Law Judge Dorothea A. Baker certified to the Judicial Officer the question as to whether complainant is entitled to a decision without further proceedings.

The complaint alleges in paragraph 5 that during the period March 1983 through October 1983, respondent violated § 2(4) of the Act (7 U.S.C. § 499b(4)) by failing to make full payment promptly to seven sellers of the agreed purchase prices, or balances thereof, in the total amount of $157,483.40, for 37 lots of perishable agricultural commodities, purchased, received and accepted in interstate and foreign commerce. All of that amount is alleged to be past due and unpaid.

Respondent's answer states (¶ 5):

> 5. That paragraph 5 is admitted insofar as it alleges that Respondent failed to make full payment, but the remainder of said paragraph is denied for lack of information. It is admitted that Respondent failed to pay in full one or more of the sellers listed in paragraph 5.

Theoretically, respondent does not admit that it owes more than $1. For example, it would be consistent with respondent's answer for respondent to prove that it paid all of the shippers in full except for the shipper in transaction number 1, in which the agreed purchase price was $315. Respondent could show that, of that $315, it failed to pay $1 of that amount.

Accordingly, respondent's answer is sufficient to prevent the entry of a decision in complainant's favor based upon the pleadings. But it is not necessarily sufficient to require a hearing.

A similar denial was made by the respondent in *In re Fava & Co.*, PACA Docket No. 2-6547, in which a ruling on the same certified question as in this case is also being issued this day. In *Fava*, the respondent denied that it owed the $368,000 alleged in the complaint, but its Chapter 11 bankruptcy petition showed that it owed all but $25,000 of that amount.

In the present case, although respondent is in a Chapter 7 bankruptcy proceeding, complainant has made no showing as to the amount of debts, if any, listed in the bankruptcy proceeding. However, before a hearing is held with respect to this matter, the Administrative Law Judge should determine through the prehearing conference procedure (7 C.F.R. § 1.140) that there is a genuine issue of fact in this respect. For example, if respondent admits that it owes even 5% of the amount alleged in the complaint, it would be appropriate to issue an order for complainant. That is, unless the amount admittedly owed is *de mini-*

mis, there is no basis for a hearing merely to determine the precise amount owed.

Since the matter to be determined in the prehearing conference is relatively simple, a telephone conference might be appropriate.

Although respondent denies that its license terminated when it failed to pay the required annual license fee, this denial is immaterial since respondent admits that "said license was surrendered in December of 1983" (Answer, ¶ 3). As long as it is admitted that respondent does not presently have a license, it is immaterial why or how the license lapsed or was surrendered.

Respondent denies that the violations were willful, flagrant and repeated, but the failure to pay such substantial sums of money in so many transactions over a 7-month period would, as a matter of law, be willful, flagrant and repeated. *In re Produce Brokers, Inc.*, 41 Agric. Dec. 2247, 2247-49 (1982). However, here as in *Produce Brokers*, a finding of willfulness should not be made since no license would be revoked (41 Agric. Dec. at 2248-49).

Order

This proceeding is remanded to the Administrative Law Judge for further proceedings consistent with the views expressed in this ruling.

In re: TRI-STATE FRUIT & VEGETABLE, INC. PACA Docket No. 2-6619. Decision and order filed February 22, 1985.

Failure to pay promptly—Publication of the facts.

The Judicial Officer affirmed the Administrative Law Judge's order publishing the finding that respondent committed repeated and flagrant violations of the Act. Respondent challenges on appeal the ALJ's finding that respondent's license terminated on May 3, 1984, and the conclusion that respondent's failure to make full payment was willful. Since neither finding is opposed by complainant, and neither finding is of legal significance, the findings are amended in accordance with respondent's appeal.

Edward M. Silverstein, for complainant.

Gene R. Krekel, Burlington, Iowa, for respondent.

Initial decision and order by *Dorothea A. Baker, Administrative Law Judge.*

Decision and Order by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Administrative Law Judge Dorothea A. Baker (ALJ) filed an initial Decision and Order on January 10, 1985, publishing the finding

that respondent hascommitted repeated and flagrant violations of § 2(4) of the Act (7 U.S.C.§ 499b(4)).[1]

On February 8, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[2] After complainant responded to the appeal, the case was referred to the Judicial Officer for decision on February 20, 1985.

Respondent's appeal is limited to challenging (i) the ALJ's finding that respondent's license terminated on May 3, 1984, and (ii) the ALJ's conclusion that respondent's failure to make full payment for produce was willful. Since changing these findings and conclusions in accordance with respondent's appeal would have no legal consequence, and is not opposed by complainant, the findings and conclusions are revised herein as requested by respondent.

Findings of Fact

1. Respondent, Tri-State Fruit & Vegetable, Inc., is a corporation, whose mailing address is Post Office Box 1123, Burlington, Iowa 52601.

2. Pursuant to the licensing provisions of the Act, license number 821043 was issued to respondent on May 3, 1982. This license is no longer in effect. Respondent's answer states that "said license was surrendered in December of 1983."

3. As more fully set forth in paragraph 5 of the complaint, during the period March through October 1983, respondent purchased and accepted in interstate and foreign commerce from seven sellers, 37 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $157,483.40.

Conclusions

Respondent's failure to make full payment promptly with respect to the 37 transactions set forth in Finding of Fact No. 3, above, constitutes repeated and flagrant violations of § 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

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[1] *See generally* Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1984 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl, *Agricultural Law*, ch. 72 (1980 and *May 1982 Supp.*).

[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 *U.S.C. §§ 450c-450g*), and Reorganization Plan No 2 of 1953, 18 Fed. Reg 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Order

Respondent, Tri-State Fruit & Vegetable, Inc., has committed repeated and flagrant violations of § 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)). The facts and circumstances set forth above shall be published.

This Order shall become effective on the 30th day after service on the respondent.

REPARATION DECISIONS

SYRACUSE & JENKINS PRODUCE CO., INC. v. TOM LANGE COMPANY, INC PACA Docket No. 2-6796. Decision issued January 12, 1987.

Contract price—Accord and satisfaction—Fees and expenses.

Complainant failed to sustain its burden of proving that f.o.b prices were to be in effect for 9 of the 10 loads, or that these terms were changed to a consignment Respondent failed to prove that the nine loads were sold with open price terms Therefore, the contract price for the nine loads is based on the reasonable market value of the produce at the time of delivery, as determined by the Market News Service Reports. The remaining load was undisputedly sold with open price terms, which means that it would have a reasonable price at the time of delivery, determined by the Market News Service Reports Based on these prices, respondent is liable for the amount claimed by complainant Respondent's partial payment is not an accord and satisfaction because it was not identified as payment in full An additional award was made to complainant for fees and expenses.

Andrew Y. Stanton, Presiding Officer.

Perry Adair, Homestead, Florida, for complainant.

LeRoy W. Gudgeon, Northfield, Illinois, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $15,105.15 in connection with the alleged sale of 10 loads of corn to respondent, in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

An oral hearing was held in St. Louis, Missouri, on February 27, 1986. At the hearing, both parties were represented by legal counsel. Two witnesses testified on behalf of complainant and one on behalf of respondent. Evidence was introduced by both parties. Pursuant to section 47.7 of the Rules of Practice (7 C.F.R. § 47.7) the report of investigation prepared by the Department is also considered part of the evidence. Both parties filed briefs and claims for fees and expenses.

Findings of Fact

1. Complainant, Syracuse & Jenkins Produce Co., Inc., is a corporation whose address is P.O. Box 2121, Naranja, Florida.

2. Respondent, Tom Lange Company, Inc., is a corporation whose address is 97 Produce Row, St. Louis, Missouri. At the times of the transactions involved herein, respondent was licensed under the Act.

3. In April and May 1984, complainant sold respondent 10 truckloads of corn, as follows: 1050 crates on April 26, 1984 (load A); 1100 crates on April 26, 1984 (load B); 950 crates on May 1, 1984 (load C); 950 crates on May 1, 1984 (load D); 950 crates on May 4, 1984 (load E); 1100 crates on May 17, 1984 (load F); 900 crates on May 18, 1984 (load G); 850 crates on May 21, 1984 (load H), 1075 crates on May 24, 1984 (load I); and 780 crates on May 24, 1984 (load J). Load J was sold on an open price basis, with the contract price to be determined after delivery, based on the prevailing market price.

4. The 10 loads of corn were shipped in interstate commerce to respondent. Upon receipt of loads A and B on April 29 and 28, 1984, respectively, respondent's employee, Bruce Rubin, called complainant's employee, Gary Syracuse, and complained about the grade of the corn.

5. Upon receiving complainant's invoices for loads C–I bearing specific prices, Bruce Rubin called Gary Syracuse to assert his view that the invoices were wrong, as the sales were on an open price basis.

6. Complainant's invoice for load E bears the notation "Freight 1600 00/xx Flat Rate." Complainant's invoice for load G bears the notation "Frt. 1.70."

7. Respondent wrote checks to complainant in payment for the 10 loads of corn, totaling $38,759.88. None of these checks were identified by respondent as in any way constituting payment in full. Complainant accepted the checks in partial payment of the alleged $53,865 01 purchase price, leaving an alleged debt of $15,105.13.

8. On July 25, 1984, a Departmental official, George M. Hartfelder, wrote to complainant concerning its informal complaint. The letter included the following paragraph: "You request an accurate account sales from Tom Lange Company, Inc. The file you submitted shows invoices were sent to Tom Lange for a set amount. Please let us know if you later authorized the respondent to handle the corn for your ac-

count." Francis Syracuse, president of complainant, wrote the following response on July 30, 1984: "In reply to your letter dated July 25, 1984, all invoices were sent to Tom Lange Co., for a set amount and later we authorized the respondent to handle the corn for our account."

9. A formal complaint was filed on December 26, 1984, which was within nine months from when the cause of action herein accrued.

Conclusions

Complainant asserts that nine of the ten loads, loads A–I, were sold to respondent on an f.o.b. basis, with specific prices in effect. Complainant admits that load J was sold with open price terms. Respondent claims that open price terms were to be in effect for all ten loads. Respondent also contends that complainant's acceptance of its checks constituted an accord and satisfaction

Complainant has submitted invoices for each load showing f.o.b. prices, which respondent admittedly received. However, respondent's employee, Bruce Rubin, claims that upon receipt of each invoice, he immediately called complainant's employee Gary Syracuse, insisting that the price was to be open, and Gary Syracuse told him to ignore the invoice. Further, complainant's argument is severely compromised by an exchange of letters between a Department official, George Hartfelder, and Francis Syracuse, complainant's president. In response to Mr. Hartfelder's letter asking whether, after sending invoices to respondent showing a set amount, Mr. Syracuse later authorized respondent to handle the corn for complainant's account, Mr. Syracuse responded unequivocally that he authorized respondent to handle all loads for its account (Finding of Fact 8). At the hearing, Mr. Syracuse explained that he was referring to two of the loads only (transcript at p 35). However, the wording of Mr Hartfelder's letter and Mr. Syracuse's response make clear complainant's admission that if the parties ever agreed to specific f o b. prices, such agreement was changed, and respondent given authorization to handle the corn for complainant's account. Complainant, as the moving party herein, has the burden of proving its version of the contract terms. *Pablo Hernandez d/b/a Pablo Distributors v. Paragon Distributing Inc* 42 Agric. Dec. 438 (1983). It is apparent from the evidence, especially the admission in Mr. Syracuse's letter, that complainant has failed to sustain this burden. Therefore we conclude that loads A–I were not assigned specific f.o.b. prices. We must also conclude that none of the loads were to be handled on consignment, as the only evidence of such an arrangement are assertions from complainant, which have been consistently denied by respondent. Respondent has claimed that the price terms for loads A–I were open, with respondent under no obligation to provide accounts of sale. However, these alleged contract terms are completely without any evidentiary support, other than testimony from

respondent's employee, Mr. Rubin, which is specifically refuted by testimony from complainant's employees, Francis and Gary Syracuse. Therefore, in the absence of sufficient evidence that the contract terms were f.o.b., consignment, or open, we are forced to determine respondent's liability for the corn by the reasonable market value of such commodity at the time of delivery, as found in the Market News Service Reports. *Black & White Vegetable Co.,Inc. v. Hale Brothers,Inc.*, 33 Agric. Dec. 1832 (1974).

Loads A and B were delivered at respondent's place of business in St. Louis, Missouri, on approximately April 28, 1984. As there are no Market News Service Reports listings for that date, we apply the closest date thereafter for which listings are available, April 30, 1984. On that date, the corn price ranged from $9.00 to $10 00 per crate. Using the $9.00 per crate price results in a market price of $9,450.00 for the 1,050 crates of load A, and $9,900.00 for the 1,100 crates of load B Loads C and D were delivered on approximately May 3, 1984, for which the Reports show a price of $9.00 per crate, a few higher. At $9.00 per crate, the 950 crates of loads C and D each had a market price of $8,550.00. Load E was delivered on approximately May 6, 1984, and the first available listing, May 7, 1984, shows a price of $7.50 to $8.50, mostly $8.00, few $8.75 per crate. Using $8.00 per crate results in a market price of $7,600.00 for the 950 crates. Load F was delivered on approximately May 19, 1984, and the first available listing, May 21, 1984, shows a price of $8.00 to $8.50, a few at $8.75 per crate. Using $8.00 per crate results in a market price of $8,800.00 for the 1,100 crates. Load G was delivered on approximately May 20, 1984, and we will use the May 21, 1984, listing for this load as well. Using $8.00 per crate results in a market price of $7,200.00 for the 900 crates. Loads H and I were delivered on approximately May 23, 1984, and the listing for that date shows $7.50 to $8.25 per crate Using $7.50 per crate results in a market price of $6,375.00 for the 850 crates of load H and $8,062.50 for the 1075 crates of load I. The Market News Service Reports prices for loads A–I total $74,487.50. From this figure we must deduct respondent's payments for freight. There are notations on complainant's invoice for load E that a freight payment was made of $1,600.00 for the 950 crates of corn, or about $1.68 per crate, and for load G that freight was paid at $1.70 per crate for 900 crates, or $1,530.00 (Finding of Fact 6). We thus assume that respondent paid freight for the other 7,075 crates at the average rate of $1.69 per crate, or $11,956.75. Therefore, the market value for loads A–I was $59,400.75.

With respect to load J, the parties agree that open price terms were in existence. This means that the price would be a reasonable price at the time for delivery, which in the present case, would be the market price as determined by the Market News Service Reports. *Wilbur Sonny*

Parker v. VBJ Packing, 42 Agric. Dec. 1217 (1983). Load J was delivered to St. Louis on approximately May 26, 1984, and the closest subsequent Market News Service Reports listing, May 29, 1984, shows a price of $6.50 to $7.50, mostly $7.00 to $7.50 per crate. Using $7.00 per crate results in a market price of $5,460.00 for the 780 crates. From this, we subtract freight at $1.69 per crate, or $1,318.20, resulting in $4,141.80, which constitutes the price for load J.

The total price for all 10 loads of corn was, therefore, $59,400.75 plus $4,141.80, or $63,542.55. Respondent has paid only $38,759.88, a difference of $24,782.67. Respondent argues, however, that its payment constituted an accord and satisfaction, eliminating any further liability. This argument must fail, as it is essential to the existence of an accord and satisfaction that payment allegedly made in satisfaction of a bonafide dispute be accompanied by such acts and declarations as amount to a condition that such payment, if accepted, is accepted in full satisfaction of the amount owing. *Warren A. Hall d/b/a Hall's Plants and Produce v. Battaglia Produce Sales, Inc.*, 42 Agric. Dec 468 (1983). The record is devoid of any evidence that respondent's payment was intended to be payment in full (Finding of Fact 7).

We have determined that respondent's payment to complainant was $24,782.67 less than the amount owed. As complainant has claimed only $15,105.13, its award will be limited to that amount. Respondent's failure to make such payment is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

Complainant, as the prevailing party, is entitled to an additional award of fees and expenses incurred in connection with the oral hearing. 7 U.S.C. 499g(b). Complainant has submitted a claim for $3,015 00, which appears reasonable on its face, and to which respondent has made no objection. It will thus be awarded to complainant in its entirety.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $15,105.13, with interest thereon at the rate of 13% per annum from July 1, 1984, until paid.

Within 30 days from the date of this order, respondent shall pay to complainant, as additional reparation for fees and expenses, $3.015.00, with interest thereon at the rate of 13% per annum from the date of this order, until paid.

Copies of this order shall be served upon the parties.

LESLIE J. BRINGINO, d/b/a L. B. ENTERPRISES *v.* TOOLEY & SONS, INC. PACA Docket No. 2-6977. Decision issued January 12, 1987.

Breach of warranty—Damages resulting from breach of warranty—Value of produce accepted—Dumping—Complaint dismissed.

Respondent sustained its burden of proving a breach of warranty by complainant based on the poor condition of the tomatoes. Tomatoes were without value as a result of their poor condition, and were properly dumped. Poor condition of tomatoes is sufficient evidence supporting respondent's assertion that they were dumped. Since the value of the tomatoes as warranted exceeds the contract price, respondent's damages were greater than the contract price. Therefore, the complaint was dismissed.

Andrew Y. Stanton, Presiding Officer.

Complainant, *pro se*.

Dan W. Montgomery, Tucson, Arizona, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation award against respondent in the amount of $1,783.80, in connection with the sale to respondent of a truckload of tomatoes, in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but declined to do so.

Findings of Fact

1. Complainant, Leslie J. Bringino, doing business as L. B. Enterprises, is an individual whose address is P.O. box 2270, Chula Vista, California.

2. Respondent, Tooley & Sons, Inc. is a corporation whose address is P.O. Box 2363, Tucson, Arizona. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately December 20, 1984, complainant sold to respondent through a broker, Otay Packing Company, Chula Vista, California, a truckload of tomatoes consisting of 66 flats of 5 x 5 tomatoes at $4.00 per flat, 198 flats of 5 x 6 tomatoes at $4.00 per flat, and 10?

lugs of 6 x 6 tomatoes at $4.50 per lug, plus $65.00 per unit for pallets and precooling, for a total of $1,783.80, f.o.b. All communications between the parties were made through Jose Gomez, an employee of the broker.

4. The tomatoes were shipped in interstate commerce to respondent, and arrived on December 21, 1984. Upon arrival, Richard Lee, respondent's general manager, called Gomez and complained about the condition of the product. Gomez told him that he would personally inspect the tomatoes on December 22, 1984, and in the meantime, respondent should attempt to repack them.

5. On December 21, 1984, respondent had the tomatoes federally inspected, resulting as follows, in relevant part:

Products Inspected	TOMATOES in two layer flats and 3 layer lugs....Applicant states 264 2 layer flats and 108 3 layer lugs
Condition of Load.	Stacked on pallets at above location
Condition of Pack:	Tight Cardboard between layers.
Temperature of Product·	In various containers: 54 to 60 degrees F
Size:	Meets size requirements as stamped.
Quality.	Each lot: Clean, well developed, well formed and smooth.
	Two layer lots Grade defects from 8 to 20%, average 12% scars and growth cracks
	Three layer lot. Grade defects from 8 to 20%, average 13% scars and growth cracks
Condition	Two layer lots: Average approximately 5% green and breakers, 45% turning and pink, 40% light red and red. Average 1% soft. In most samples 4 to 20%, some none, average 7% Gray Mold Rot mostly in initial, some advanced stages From 4 to 28%, average 13% damage by sunken, discolored areas occurring mostly over shoulders From 4 to 8% average 6% damage by bruising
	Three layer lot Average approximately 15% green and breakers, 65% turning and pink, 15% light red and red. In most samples 4 to 8%, some none, average 4% decay From 8 to 20%, average 17% damage by sunken discolored areas occurring mostly over shoulders. In most samples from 4 to 8%, some none, average 4% by bruising.

6. On December 22, 1984, Gomez arrived at respondent's place of business and, after examining the tomatoes, advised respondent to dump the entire load because the labor involved in repacking would exceed the value of any toma toes that might be salvaged. Gomez advised complainant of these circumstances.

7. On December 17, 1984, respondent dumped the entire load of tomatoes. 8.Respondent has failed to pay complainant any part of the $1,783.30 contract price for the tomatoes. 9.A formal complaint was filed on July 8, 1985, which was within nine months from when the alleged cause of action herein accrued.

Conclusions

Complainant apparently contests respondent's claim that the truckload of tomatoes was in such poor condition when it arrived that it had to be dumped in its entirety. Complainant also questions whether there is sufficient evidence that the tomatoes were actually dumped.

Respondent and the broker's employee, Jose Gomez, assert that when the tomatoes arrived at respondent's warehouse, respondent called Gomez to complain about their condition. Gomez told respondent to begin repacking the tomatoes and said that he would be there the following day to inspect them. Respondent then obtained a federal inspection (Finding of Fact 5) which showed considerable deterioration. The following day, Gomez examined the load and advised respondent to dump the whole thing, as the price received on resale would not cover the cost of repacking. Gomez then notified complainant of these events. Complainant does not contest any of these factual assertions by respondent.

In an f o.b. sale such as this, the seller gives an implied warranty of suitable shipping condition, that the commodity, at the time of billing, would be in a condition which, if the shipment were handled under normal transp ortation service and conditions, would assure delivery without abnormal deterioration at the contract destination agreed upon by the parties. *Farm Market Service, Inc. v. Albertsons Inc. a/t/a Southco Division,* 42 Agric. D ec. 429 (1983); 7 C.F.R. § 46.43(j). As respondent accepted the tomatoes, it became liable for the contract price therefor, less damages resulting from any breach of warranty. It is respondent's burden to prove the breach and damages by a preponderance of the evidence. *Farm Market Service, Inc. v. Albertsons Inc., a/t/a Southco Division, supra.* It is clear that respondent has sustained this burden.

The December 21, 1984, inspection shows the 5 x 5 and 5 x 6 tomatoes incurring an average of 26% condition defects, including 7% decay,and the 6 x 6 tomatoes incurring an average of 25% condition defects, including 4% decay. Abnormal transportation conditions are not alleged, nor do they appear from the record. Clearly, these tomatoes were in poor condition and in breach of warranty.

Respondent's damages resulting from the breach are the difference at the time and place of acceptance between the actual value of the tomatoes and their value if they had been as warranted. Respondent contends that the tomatoes had no actual value and were dumped, based upon the advice given by the broker's employee, Gomez, that the cost of repacking would exceed any proceeds from resale. The federal inspection results indicate that the tomatoes were in bad condition, and only a small portion could be sold after repacking. The price which could have been obtained for these tomatoes can be determined by examining the December 21, 1984, Market News Service Reports for Tucson, Arizona The Reports show a price of from $4.00 to $6.00, mostly $5 00 to $6.00 per flat for the 5x5 and 5x6 tomatoes, and $6 50 to $7.50 per lug for the 6x6 tomatoes The most representative price quotations are $5.00 per flat for the 5x5 and 5x6 tomatoes, and $6.50 per flat for the 6x6 tomatoes At these prices, it is likely that the proceeds derived from the tomatoes which could be resold would be more than offset by costs of labor and freight. Therefore, respondent's assertion that the whole load needed to be dumped is supported by the evidence.

The poor condition of the tomatoes also constitutes adequate evidence to support respondent's claim that the tomatoes were dumped. Therefore, complainant's questions as to whether the tomatoes were actually dumped are without merit.

The value of the tomatoes as warranted, according to the Reports, were $5.00 per flat for the 5x5's and 5x6's and $6.50 per lug for the 6x6's which exceed the contract prices of $4 00 and $4.50 respectively Respondent's damages thus exceeded the contract price, rendering free from any liability herein. Accordingly, the complaint must be dismissed.

Order

The complaint is hereby dismissed

Copies of this order shall be served upon the parties.

CHIQUITA BRANDS, INC. v. INTERNATIONAL A.G., INC PACA
Docket No. 2-7328. Decision issued January 12, 1987

Material allegations not denied.

Decision issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

(Summary)

Respondent's answer to the complaint neither admitted or denied the material allegations. Respondent was given an opportunity to deny the material allegations and did not.

Respondent was ordered to pay complainant, within 30 days from the date of this order, as reparation, $6,797.00 plus 13 percent interest per annum from February 1, 1986, until paid.

Estate of SIDNEY L. DOUGLAS and JOSEPHINE DOUGLAS, Executrix, d/b/a S.L. DOUGLAS *v.* INTERNATIONAL A.G., INC. PACA Docket No. 2-7351. Order issued January 21, 1987.

Admission of material allegations.

Dennis Becker, Presiding Officer

Complainant, *pro se*.

C. Peter Beefler, Miami, Florida, for respondent.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

(Summary)

Respondent's answer to the complaint admitted the material allegations including the indebtedness claimed by the complainant.

Respondent was ordered to pay complainant, as reparation, $5,247.00 plus 13 percent interest per annum from March 1, 1986, until paid.

APPLEWOOD ORCHARDS, INC. *v.* C.L. CONTRERAS and BENCH MARK BROKERAGE, INC. PACA Docket No. 2-7003. Decision issued January 22, 1987.

Authority of broker—Unauthorized price allowance—Admission of liability by broker—Complaint dismissed against buyer.

Where broker, with apparent authority, granted an unauthorized price allowance, the broker, but not the buyer, was held liable for the difference between the authorized and the unauthorized sales price.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter "the Act." A timely complaint was filed in which complainant sought a reparation award against respondents in the amount of $701.25 in connection with the sale and shipment of one trucklot of apples in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. Thereafter, respondent C. L. Contreras filed an answer denying liability. Respondent Bench Mark Brokerage, Inc., filed no answer.

Since the amount claimed does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given opportunities to submit additional evidence in the form of verified statements and to file briefs. Both complainant and respondent C L. Contreras submitted verified statements but no briefs Respondent Bench Mark Brokerage, Inc , filed nothing

Findings of Fact

1 Complainant Applewood Orchards, Inc., (hereinafter "Applewood") is a corporation with a mailing address at 2998 Rodesiler Highway, Deerfield, Michigan 49238. At the time of the transaction involved herein, Applewood was licensed under the Act.

2 Respondent C. L. Contreras (hereinafter "Contreras") is an individual doing business as "C. L. Contreras Produce" with a mailing address at 2520 Airline, Houston, Texas 77009. At the time of the transaction involved herein, Contreras was licensed under the Act.

3. Respondent Bench Mark Brokerage, Inc., (herei after "Bench Mark") at the time of the transaction involved herein was a corporation licensed under the Act with a mailing address at 3100 Produce Row, Houston, Texas 77023. At the time of the transaction involved herein, Bench Mark was licensed under the Act. Bench Mark is no longer in business.

4 On or about November 13, 1984, Applewood in interstate commerce sold Contreras by oral contract one trucklot of apples, consisting of 151-12/3# U.S. Fancy Red Delicious and 24-8/5# U.S. Generic Red Delicious at an agreed price of $8.75 per 12/3# unit and $7.50 per 8/5# unit, for a total price of $1,501.25.

5. The contract was negotiated by Bench Mark which acted as agent for Applewood.

6. Contreras accepted the apples at destination and has paid Applewood $799.50 of the $1,501.25 demanded by Applewood as the purchase price.

7. A formal complaint was filed on August 1, 1985, which was within nine months of the time the cause of action accrued.

Subsidiary Findings of Fact and Conclusions

The apples sold to Contreras had been previously sold by Bench Mark to three other buyers. Without informing Applewood, Bench Mark lowered the quantity term of the three original sales contracts to the original buyers and sold the left over apples to Contreras. Con-

treras claims that the apples had been rejected by the original buyers because they were off-condition, and that he only accepted them because Bench Mark granted protection on the price. The record contains a broker's memorandum sent to Contreras by Bench Mark memorializing the contract with a "with protection" price term. According to Applewood, Bench Mark had no authority to negotiate such a price term and did not send a copy of the memorandum to Applewood revealing that it had done so. In fact, Applewood in its complaint contends that it authorized no deduction from the price on the original contracts, and that upon receipt of only part of the original invoice price from Contreras, it contacted Bench Mark and was informed that there should not have been any change in the pricing, and that Bench Mark promised to make sure that Contreras made full payment. In his answer, Contreras maintains that, on the contrary, Bench Mark agreed to the amount remitted to Applewood by Contreras.

Although Bench Mark was served a copy of the complaint and a copy of the investigation report containing Contreras' answer, Bench Mark filed neither an answer nor a statement rebutting the allegations in Contreras' answer. Failure to file an answer constitutes an admission of the facts alleged in the complaint (7 C.F.R. § 47.8(c)). Bench Mark has therefore admitted that no price allowance had been authorized by Applewood, and that it failed to send Applewood the broker's memorandum of sale which would have revealed Bench Mark's unauthorized act. An agent is liable to his principal for an unauthorized allowance granted by the agent to the buyer. Bench Mark therefore has violated section 2 of the Act, and reparation will be ordered against Bench Mark for the difference between the original price authorized by Applewood and the unauthorized amount paid by Contreras. *Sugar Creek v. Marvin & Market*, 32 Agric. Dec. 1369 (1963); *Adam v. Phillips*, 31 Agric. Dec. 1200 (1962).

As for Applewood's claim against Contreras, it must fail because Contreras accepted the apples in reasonable reliance upon Bench Mark's grant of price protection. "An agent has the apparent or implied authority to do those things which are usual and proper to the conduct of the business which he is employed to conduct." *Mechanical Wholesale, Inc., v. Universal-Rundle Corp.*, 432 F.2d 228 (5th Cir. 1970); *New York Produce v. Carioto*, 31 Agric. Dec. 109 (1972); *Irving Goldberg & Sons v. Carbone Bros.*, 22 Agric. Dec. 1405 (1963). Negotiating a contract for the sale of perishable agricultural commodities which includes a "with protection" price term falls within the limits of things usual and proper for a produce broker, hence Bench Mark had *apparent* authority to negotiate the contract even though it did not have *actual* authority. Since Contreras paid for the apples pursuant to a

contract made with apparent authority by Bench Mark, Applewood's complaint against Contreras will be dismissed.

Order

The complaint against respondent C. L. Contreras is hereby dismissed.

Within 30 days from the date of this order, respondent Bench Mark Brokerage, Inc., shall pay complainant Applewood Orchards, Inc., as reparation $701.25, with interest thereon at the rate of 13% per annum from January 1, 1985, until paid.

Copies shall be served upon the parties.

SOUTHEAST FARMS, INC. v. WEINSTEIN PRODUCE SALES, INC. PACA Docket No. 2-7165. Decision issued January 22, 1987.

Acceptance, liability for invoice price—Counterclaim for setoff, dismissed.

Where respondent purchases, receives and accepts a truck load of tomatoes from complainant, respondent is liable for the invoice price. Where respondent fails to file its counterclaim for setoff within nine months after the cause of action accrued, the counterclaim is dismissed.

Sharlene W Lassiter, Presiding Officer.

Complainant and Respondent, *pro se*.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et. seq.*). The complainant filed a timely informal complaint in which the complainant sought an award of reparation against respondent in the amount of $7,576.00 in connection with a shipment of tomatoes in interstate commerce.

Copies of the Report of Investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability, and a counterclaim.

Because the amount claimed as damages was less than $15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties had the opportunity to file evidence in the form of verified statements. Neither party did so. Although both parties were given an opportunity to file a brief, neither party did so.

Findings of Fact

1. Complainant, Southeast Farms, Inc., hereinafter referred to as Southeast, is a corporation whose mailing address is P.O. Box 370, East Palatka, Florida 32031.

2. Respondent, Weinstein Produce Sales, Inc., hereinafter referred to as Weinstein, is a corporation whose mailing address is P.O. Box 7364, Boise, Idaho 83707. At the time of the transaction involved herein Weinstein was licensed under the Act.

3. On January 10, 1985, in the course of interstate commerce, Southeast sold and shipped to Weinstein, from Homestead, Florida to Boise, Idaho, one truckload of tomatoes pursuant to an oral contract, at a f.o.b. price of $7,576.00.

4. Weinstein received and accepted the truckload of tomatoes at Boise, Idaho.

5. On or about January 12, 1985, Weinstein received the invoice for the tomatoes from Southeast without complaint.

6. Southeast filed a formal complaint on January 29, 1986. It also filed an informal complaint on April 24, 1985, which was within nine months after the cause of action herein accrued. Weinstein filed its answer with a counterclaim for setoff on April 23, 1986, which was not within nine months after the cause of action herein accrued.

Conclusions

This proceeding involves the purchase of a truckload of tomatoes by Weinstein from Southeast, f.o.b. Boise, Idaho. Southeast alleges that Weinstein purchased, received and accepted a truckload of tomatoes, but has yet to remit the invoice price.

As the moving party, Southeast has the burden to prove the affirmative allegations in its complaint that Weinstein purchased, received and accepted the truckload of tomatoes from Southeast and that Weinstein has yet to pay the invoice price. *New York v. Sandler,* 32 Agric. Dec. 702, 705 (1973). Southeast met its burden in this case. Southeast proffered the invoice sent to Weinstein and a letter from Weinstein dated April 2, 1985, in which Weinstein states that it purchased the tomatoes in order to deduct the proceeds received by Southeast in an unrelated transaction with a third party with whom Weinstein allegedly had an exclusive contractual relationship. Weinstein, in its answer, denied liability but did not produce any evidence in support. We find that the invoice and letter dispositively show that Weinstein purchased, received and accepted the truckload of tomatoes from Southeast. Therefore, we find that Southeast is entitled to a reparation award for the invoice price, $7,576.00, from Weinstein.

The counterclaim for setoff asserted by Weinstein is not subject to the jurisdiction of the Secretary. On April 23, 1986, Weinstein filed a counterclaim for setoff with its answer, which alleges that in an unrelated transaction, Southeast interfered in an exclusive contractual rela-

tionship between Weinstein and a third party. Weinstein also alleges that such interference merits a setoff against the invoice price of its contract with Southeast . However, Weinstein did not file this counterclaim within nine months after the cause of action accrued. Accordingly, we find that Weinstein's counterclaim is not subject to the jurisdiction of the Secretary, and therefore, must be dismissed. *Sanders and Drake v. Gardner Bros.*, 31 Agric. Dec. 128 (1972).

Order

Within 30 days from the date of this Order Weinstein Produce Sales, Inc. shall pay to Southeast Farms, Inc , as reparation $7,576 00 with interest thereon at the rate of 13% per annum from February 1, 1985, until paid.

The counterclaim for setoff raised by Weinstein Produce Sales, Inc. is hereby dismissed.

Copies of this order shall be served upon the parties

APPLELAND FRUIT SALES, INC. *v.* INTERNATIONAL A.G., INC PACA Docket No. 2-7337. Decision issued January 22, 1987.

Material allegations not denied.

Decision issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

(Summary)

Respondent's answer to the complaint neither admitted or denied the material allegations therein. Respondent was given an opportunity to deny the allegations, including the indebtedness claimed by the complainant, but did not do so

Respondent was ordered to pay complainant, as reparation, $25,590.50 plus 13 percent interest per annum from April 1, 1986, until paid

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INTERSTATE PACKING CO. *v.* PACIFIC FARM COMPANY, PACA Docket No. 2-7348. Decision issued January 29, 1987.

Failure to file answer to order reopening after default.

Andrew Y. Stanton, Presiding Officer.

Complainant, pro se

Respondent, pro se

Decision issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

(Summary)

Respondent failed to file a timely answer to the order reopening the proceeding after default. Accordingly an order was issued without further procedure.

Respondent was ordered to pay complainant, as reparation, $29,817.00 plus 13 percent interest per annum from July 1, 1985, until paid.

MISCELLANEOUS REPARATION ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

MONSON BROS. CO. *v.* SUN TRADING CO., INC. PACA Docket No. 2-6322. Order issued January 12, 1987.

ORDER OF DISMISSAL

(Summarized)

The complainant and respondent were given 20 days in which to show cause why this proceeding should not be dismissed. Neither party responded to that Notice.

Therefore, the complaint and counterclaim were dismissed.

M & C P FARMS *v.* LLOYD MYERS CO., INC. PACA Docket No. 2-6873. Ruling issued January 14, 1987.

Edward M. Silverstein, Presiding Officer.

RULING ON RESPONDENT'S SECOND PETITION FOR RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on September 29, 1986, [45 A.D. 2099] awarding reparation to the complainant in the amounts of $52,386.96 plus interest from December 1, 1984, until paid, and $5,716.78 plus interest from the date of the order until paid. On October 24, 1986, the respondent moved for reconsideration of that decision and for reopening of the hearing. By order issued December 2, 1986, respondent's petition was dismissed and the order of September 29, 1986, was reinstated except that respondent was given an additional 30 days in which

to make payment to complainant. On January 5, 1987, subsequent to the presiding officer's grant of an extension of time, respondent filed its second petition for reconsideration.[1]

Basically, this case involves olives which complainant sold to various buyers with respondent acting as the broker. The crux of the September 29, 1986, Decision and Order was that respondent received payment on complainant's behalf from one of these buyers but failed to remit said payment to complainant. It should be noted that we are firmly and completely convinced that respondent received the payment of $52,739.70 from La Maison De Fruits Et. Le Gumes Supra, Inc (La Maison), for the olives which complainant sold to La Maison. As respondent's principal was in the courtroom at the time of the hearing and chose to refuse to take the stand to offer contrary evidence, the only evidence in the record on this point makes this crystal clear From his refusal to take the stand, it only can be concluded that if the principal did offer such testimony it would have been perjured. As a result of these facts, we conclude that respondent's claim in its petition for reconsideration that complainant failed to prove that respondent received the $52,739.70 from La Maison is without merit. [2] Therefore, we had no choice but to rule as we did in our September 29, 1986, Decision and Order.

Respondent's second petition for reconsideration has been reviewed as well as its second request to reopen the hearing. Nothing in either document raises an issue which we have not previously decided in this case. [3] Therefore, based on the record as a whole, we are satisfied that respondent's claims in its second motion for reconsideration and its second petition to reopen are without merit and that the September 29, 1986, Decision and Order is amply supported by the evidence and by the law applicable thereto. Accordingly, the respondent's second motion for reconsideration and its second petition to reopen are dismissed without prior service on complainant. Moreover, we will not entertain any further petitions for reconsideration offered by respondent Certainly, three bites of the apple is sufficient. *L.T. Malone Company* v. *Al Kaiser & Bros.*, 19 Agric. Dec. 444 (1960), *L T. Malone Company*

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[1] It is noted that, as the respondent had already had a petition for reconsideration dismissed and the extension of time was not requested until the last minute before the September 29, 1986, Decision and Order become effective, the extension of time was improvidently granted

[2] It is noted that respondent and its principal have carefully avoided denying that it received the $52,739 70 from La Maison in any meaningful manner.

[3] It is noted that, under the Rules of Practice (7 C F.R. § 47 24(b), motions to reopen must be filed prior to the issuance of a decision and order. Therefore, even were there any merit in respondent's petition, such a motion should not be entertained at this time *Valley Packing Co* v *Demase & Manna*, 29 Agric. Dec. 101 (1970)

v. *Al Kaiser & Bros.*, 19 Agric. Dec. 445 (1960); and *Salinas Valley Vegetable Exchange* v. *H.B. Frost Company and Crisp Bros., Inc.*, 19 Agric. Dec. 446 (1960). Respondent's alternative, if it does not agree with our Decision and Order, is to appeal to the appropriate court. *See* 7 U.S.C. § 499f.

The Decision and Order of September 29, 1986, is reinstated except that respondent shall have 30 days from the date of this order to pay complainant the reparation awarded therein.

Copies of this order shall be served upon the parties.

HARRY SHAFFER, INC. *v.* VAN SOLKEMA FARMS. PACA Docket No 2-6881. Order issued January 29, 1987.

ORDER ON RECONSIDERATION

(Summarized)

Complainant's objections to the Decision and Order issued November 24, 1986, were fully answered therein. Upon reconsideration it is found that the order of November 24, 1986, is supported by the evidence and the law applicable thereto. Accordingly, the complainant's petition for reconsideration was dismissed.

The reparation awarded in the order of November 24, 1986, was ordered be paid within thirty (30) days from the date of this order

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BETTE L. BLACKWOOD, CLARENCE W. ROBINSON & DANIEL ROBINSON, d/b/a ROBINSON FARMS *v.* KLEIMAN & HOCHBERG. PACA Docket No. 2-7222. Order issued January 29, 1987.

ORDER OF DISMISSAL

(Summarized)

Respondent tendered to complainant a check in full settlement of complainant's claim. Therefore, complainant authorized the dismissal of its complaint. Accordingly, the complaint was dismissed.

PRICE COLD STORAGE & PACKING CO., INC. v. INTERNATIONAL A.G., INC. PACA Docket No. 2-7350. Order issued January 29, 1987.

ORDER OF DISMISSAL

(Summarized)

Respondent tendered to complainant a check in full settlement of complainant's claim. Therefore, complainant authorized dismissal of its complaint

Accordingly, the complaint was dismissed.

WHITEWING RANCH CO. v KLEIMAN & HOCHBERG, INC., and/or AL GILMORE CO , INC , and/or LLOYD MEYERS CO., INC. PACA Docket No 2-7357. Order issued January 29, 1987.

ORDER OF DISMISSAL

(Summarized)

Complainant notified the Department that settlement had been reached. Therefore, complainant authorized dismissal of its complaint.

Accordingly, the complaint was dismissed.

RED MOUNTAIN FARMS MANAGEMENT CO. v. KLEIMAN & HOCHBERG, INC , and/or AL GILMORE CO., INC., and/or LLOYD MYERS CO , INC PACA Docket No. 2-7360. Order issued January 29, 1987

ORDER OF DISMISSAL

(Summarized)

Complainant notified the Department that settlement had been reached with respect to all the respondents. Therefore, complainant authorized dismissal of its complaint.

Accordingly, the complaint was dismissed

REPARATION DEFAULT DECISIONS ISSUED BY DONALD A. CAMPBELL, JUCICIAL OFFICER

(Summarized)

CHERRY CENTRAL CO-OPERATIVE INC. a/t/a WILDERNESS FOODS v. B.G. MARKETING COMPANY. PACA Docket No. RD-87-32. Default order issued January 5, 1987.

Respondent was ordered to pay complainant, as reparation, $20,376.45 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

MUIR-ROBERTS COMPANY INC. *v.* C & E BROKERS INC. PACA Docket No. RD-87-33. Default order issued January 5, 1987.

Respondent was ordered to pay complainant, as reparation, $45,941.00 plus 13 percent interest thereon per annum from November 1, 1985, until paid.

TONY VITRANO COMPANY *v.* LYNDA CORPORATION a/t/a AIRWAY CELLO PACK. PACA Docket No. RD-87-34. Default order issued January 5, 1987.

Respondent was ordered to pay complainant, as reparation, $15,418.50 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

HOVERSON & SONS *v.* AL'S POTATO CO. PACA Docket No. RD-87-35. Default order issued January 5, 1987.

Respondent was ordered to pay complainant, as reparation, $679.50 plus 13 percent interest thereon per annum from February 1, 1986, until paid.

VISTA MCALLEN INC. *v.* BECKHAM FARM ONE. PACA Docket No. RD-87-36. Default order issued January 5, 1987.

Respondent was ordered to pay complainant, as reparation, $5,652.00 plus 13 percent interest thereon per annum from February 1, 1985, until paid.

SEQUOIA ENTERPRISES INC. *v.* BOISE FARMERS MARKET INC. PACA Docket No. RD-87-37. Default order issued January 6, 1987.

Respondent was ordered to pay complainant, as reparation, $4,595.00 plus 13 percent interest thereon per annum from March 1, 1986, until paid.

RIVERSIDE CITRUS COMPANY *v.* JAY-KEN DISTRIBUTORS INC. PACA Docket No. RD-87-39. Default order issued January 6, 1987.

Respondent was ordered to pay complainant, as reparation, $18,503.00 plus 13 percent interest thereon per annum from October 1, 1985, until paid.

SUN BELT TOMATO SALES INC. v. TOMMY R. TUCKER d/b/a TOMMY TUCKER PRODUCE. PACA Docket No. RD-87-40. Default order issued January 6, 1987.

Respondent was ordered to pay complainant, as reparation, $3,910 30 plus 13 percent interest thereon per annum from December 1, 1985, until paid.

FIVE CROWNS INC a/t/a FIVE CROWNS MARKETING v. A & J FAMILY PRODUCE PACA Docket No. RD-87-41. Default order issued January 6, 1987

Respondent was ordered to pay complainant, as reparation, $39,221.50 plus 13 percent interest thereon per annum from March 1, 1986, until paid.

ALBERT ICARDO & ASSOCIATES INC. v. FARLEY & CALFEE INC. PACA Docket No. RD-87-42. Default order issued January 7, 1987.

Respondent was ordered to pay complainant, as reparation, $6,023 25 plus 13 percent interest thereon per annum from August 1, 1985, until paid.

SYRACUSE & JENKINS PRODUCE INC. v. JOE PINTO & SON INC PACA Docket No. RD-87-43. Default order issued January 7, 1987.

Respondent was ordered to pay complainant, as reparation, $14,600.50 plus 13 percent interest thereon per annum from Feburary 1, 1986, until paid.

HIGH and MIGHTY FARMS INC. v. DON A. PELUCCA d/b/a DON PELUCCA. PACA Docket No. RD-87-44. Default order issued January 7, 1987.

Respondent was ordered to pay complainant, as reparation, $12,702.65 plus 13 percent interest thereon per annum from March 1, 1986, until paid.

THE GARIN COMPANY *v.* JOE PINTO & SON INC. PACA Docket No. RD-87-45. Default order issued January 7, 1987.

Respondent was ordered to pay complainant, as reparation, $7,902.87 plus 13 percent interest thereon per annum from November 1, 1985, until paid.

PAUL WESTHEIMER d/b/a SCHOHARIE VALLEY FARMS *v.* LYNDA CORPORATION a/t/a AIRWAY CELLO PACK. PACA Docket No. RD-87-46. Default order issued January 7, 1987.

Respondent was ordered to pay complainant, as reparation, $1,950.00 plus 13 percent interest thereon per annum from March 1, 1986, until paid.

TURBANA CORPORATION *v.* MEDINA FRUITS & VEGETABLES INC. PACA Docket No. RD-87-47. Default order issued January 7, 1987.

Respondent was ordered to pay complainant, as reparation, $6,472.25 plus 13 percent interest thereon per annum from June 1, 1985, until paid.

SEALD-SWEET INC. *v.* DELEGAL CORPORATION. PACA Docket No. RD-87-48. Default order issued January 7, 1987.

Respondent was ordered to pay complainant, as reparation, $4,206.00 plus 13 percent interest thereon per annum from December 1, 1985, until paid.

CROWLEY SALES *v.* FARMER SMITH'S WHOLESALE INC. PACA Docket No. RD-87-20. Default order issued January 14, 1987.

Respondent was ordered to pay complainant, as reparation, $10,236.00 plus 13 percent interest thereon per annum from September 1, 1985, until paid.

TRI PRODUCE CO. *v.* JOE PINTO & SON INC. and/or RALPH M. JARSON d/b/a RALPH JARSON. PACA Docket No. RD-87-51. Default order issued January 14, 1987.

There was insufficient evidence to hold Ralph Jarson liable. Therefore, the complaint against that respondent was dismissed.

Respondent Joe Pinto & Son Inc. was ordered to pay complainant, as reparation, $1,800.00 plus 13 percent interest thereon per annum from December 1, 1985, until paid.

TONY VITRANO COMPANY *v.* WINTER PRODUCE CO. INC. PACA Docket No. RD-87-52. Default order issued January 14, 1987.

Respondent was ordered to pay complainant, as reparation, $13,503.79 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

DOLE FRESH FRUIT COMPANY *v.* DUNNE PRODUCE CO. INC. PACA Docket No RD-87-53 Default order issued January 14, 1987.

Respondent was ordered to pay complainant, as reparation, $12,397 00 plus 13 percent interest thereon per annum from June 1, 1986, until paid.

PHELAN & TAYLOR PRODUCE COMPANY INC. *v.* JOE PINTO & SON INC. PACA Docket No. RD-87-54. Default order issued January 14, 1987.

Respondent was ordered to pay complainant, as reparation, $30,945.20 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

SANTO TOMAS PRODUCE ASSOCIATION *v.* FRANK S. MEDRANO d/b/a FRANK'S PRODUCE. PACA Docket No. RD-87-55. Default order issued January 15, 1987.

Respondent was ordered to pay complainant, as reparation, $7,959.00 plus 13 percent interest thereon per annum from September 1, 1985, until paid.

ROGER HARLOFF PACKING INC. *v.* FLAMINGO PRODUCE SALES INC. PACA Docket No. RD-87-56. Default order issued January 15, 1987.

Respondent was ordered to pay complainant, as reparation, $12,240.00 plus 13 percent interest thereon per annum from December 1, 1985, until paid.

N.P. DEOUDES INC. *v.* CAPITAL CITY PRODUCE CO. PACA Docket No. RD-87-57. Default order issued January 15, 1987.

Respondent was ordered to pay complainant, as reparation, $7,866.00 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

RUBIN BROTHERS PRODUCE CORPORATION v. HARRY'S FOOD SERVICE INC. PACA Docket No. RD-87-59. Default order issued January 15, 1987.

Respondent was ordered to pay complainant, as reparation, $9,201.00 plus 13 percent interest thereon per annum from February 1, 1986, until paid.

HENRY AVOCADO PACKING CORPORATION v. RICHARD ITULE PRODUCE INC. PACA Docket No. RD-87-60. Default order issued January 15, 1987.

Respondent was ordered to pay complainant, as reparation, $11,786.50 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

RISING STAR BROKERAGE INC. v. JOSEPH A. CUTTONE, JR. d/b/a JAC PRODUCE. PACA Docket No. RD-87-61. Default order issued January 16, 1987.

Respondent was ordered to pay complainant, as reparation, $7,879.90 plus 13 percent interest thereon per annum from January 1, 1986, until paid.

EXETER SALES INC. v. INTER-TEX ENTERPRISES INC. PACA Docket No. RD-87-62. Default order issued January 16, 1987.

Respondent was ordered to pay complainant, as reparation, $1,425.60 plus 13 percent interest thereon per annum from October 1, 1985, until paid.

BADLANDS PROVISIONS CO. v. DON PELUCCA. PACA Docket No. RD-87-63. Default order issued January 16, 1987.

Respondent was ordered to pay complainant, as reparation, $8,976.00 plus 13 percent interest thereon per annum from December 1, 1985, until paid.

PISMO-OCEANO VEGETABLE EXCHANGE *v.* VINCENT MAENZA BANANA CO. a/t/a MAENZA & SONS PACA Docket No. RD-87-64. Default order issued January 16, 1987.

Respondent was ordered to pay complainant, as reparation, $7,139.85 plus 13 percent interest thereon per annum from December 1, 1985, until paid.

BONITA PACKING CO. v. VINCENT D. MAENZA d/b/a VINCENT MAENZA BANANA CO. a/t/a MAENZA & SONS. PACA Docket No RD-87-65. Default order issued January 16, 1987

Respondent was ordered to pay complainant, as reparation, $257.60 plus 13 percent interest thereon per annum from December 1, 1985, until paid.

SUNSPROUTS OF TEXAS INC. v VINCENT D. MAENZA d/b/a VINCENT MAENZA BANANA CO. a/t/a MAENZA & SONS. PACA Docket No. RD-87-66. Default order issued January 20, 1987.

Respondent was ordered to pay complainant, as reparation, $1,571.25 plus 13 percent interest thereon per annum from December 1, 1985, until paid.

CARDINAL DISTRIBUTING CO INC. *v.* JOE PINTO & SON INC. PACA Docket No. RD-87-67. Default order issued January 20, 1987.

Respondent was ordered to pay complainant, as reparation, $2,585.10 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

PISMO-OCEANO VEGETABLE EXCHANGE v. JOE PINTO & SON INC PACA Docket No. RD-87-68. Default order issued January 20, 1987.

Respondent was ordered to pay complainant, as reparation, $1,232 90 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

BIANCHI & SONS PACKING CO. *v.* MCALLEN PRODUCE CO. INC. PACA Docket No. RD-87-69. Default order issued January 20, 1987.

Respondent was ordered to pay complainant, as reparation, $13,069.80 plus 13 percent interest thereon per annum from December 1, 1985, until paid.

MIZOKAMI OF COLORADO INC. *v.* LYNDA CORPORATION a/t/a AIRWAY CELLO PACK. PACA Docket No. RD-87-70. Default order issued January 20, 1987.

Respondent was ordered to pay complainant, as reparation, $24,699.95 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

RENFROE PECAN CO. *v.* MELON PRODUCE INC. PACA Docket No. RD-87-71. Default order issued January 20, 1987.

Respondent was ordered to pay complainant, as reparation, $1,000.00 plus 13 percent interest thereon per annum from August 1, 1985, until paid.

G.A. FUNDERBURK CO., INC. *v.* DARCO PRODUCE, INC. PACA Docket No. RD-87-23. Default order issued January 21, 1987.

Five transactions which accrued earlier than nine months before the filing of the informal complaint, and are therefore not within the Secretary's jurisdiction, were deducted from the amount claimed in the complaint.

Respondent was ordered to pay complainant, as reparation, $7,068.45 plus 13 percent interest thereon per annum from August 1, 1985, until paid.

TENNECO WEST INC. *v.* C & E BROKERS INC. PACA Docket No. RD-87-72. Default order issued January 16, 1987.

Respondent was ordered to pay complainant, as reparation, $48,312.02 plus 13 percent interest thereon per annum from March 1, 1986, until paid.

DRC ENTERPRISES INC. *v.* DON PELUCCA. PACA Docket No. RD-87-73. Default order issued January 26, 1987.

Respondent was ordered to pay complainant, as reparation, $4,239.00 plus 13 percent interest thereon per annum from December 1, 1985, until paid.

KENT W. NORTHCROSS d/b/a NORTHCROSS DISTRIBUTING *v.* ANTHONY J. MOREALI, JR. d/b/a PACIFIC COAST PRODUCE BROKERAGE. PACA Docket No. RD-87-74. Default order issued January 26, 1987.

Respondent was ordered to pay complainant, as reparation, $15,379.60 plus 13 percent interest thereon per annum from January 1, 1986, until paid.

L & J MARKETING CO. *v.* ANTHONY J MOREALI, JR. d/b/a PACIFIC COAST PRODUCE BROKERAGE. PACA Docket No RD-87-75 Default order issued January 26, 1987

Respondent was ordered to pay complainant, as reparation, $1,330 00 plus 13 percent interest thereon per annum from January 1, 1986, until paid.

AJM FARMS INC *v.* ANTHONY J MOREALI, JR. d/b/a PACIFIC COAST PRODUCE BROKERAGE. PACA Docket No. RD-87-76. Default order issued January 26, 1987.

Respondent was ordered to pay complainant, as reparation, $3,334.70 plus 13 percent interest thereon per annum from January 1, 1986, until paid.

BRADLEY PRODUCE COMPANY *v.* ANTHONY J. MOREALI, JR d/b/a PACIFIC COAST PRODUCE BROKERAGE. PACA Docket No. RD-87-77. Default order issued January 26, 1987.

Respondent was ordered to pay complainant, as reparation, $673 00 plus 13 percent interest thereon per annum from January 1, 1986, until paid.

BUD ANTLE INC. a/t/a BUD OF CALIFORNIA *v* KENNER PRODUCE INC. PACA Docket No. RD-87-78. Default order issued January 26, 1987.

Respondent was ordered to pay complainant, as reparation, $1,901.50 plus 13 percent interest thereon per annum from April 1, 1986, until paid

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JACK T. BAILLIE CO., INC. *v.* MELON PRODUCE, INC PACA Docket No. RD-87-9 Order Denying Motion to Reopen and Default Order issued January 27, 1987.

Respondent's belief that it was restrained from paying any money to complainant because of an order issued in another proceeding is irrelevant to its duty to file an answer, which would not entail the payment of any money to complainant. The alleged confusion resulting from respondent's representation by more than one law firm is not a legitmate excuse for failing to file a timely answer. The record reflects proper service of the complaint upon respondent and it does not show improper handling by respondent's attorneys to the degree necessary to constitute good reason for reopening after default.

Respondent was ordered to pay complainant, as reparation, $20,158.75 plus 13 percent interest thereon per annum from March 1, 1986, until paid.

MT. PLEASANT GROWERS & PACKERS INC. a/t/a ISLAND TOMATO PACKERS *v.* TERESSA A. EVERETT d/b/a STAR PRODUCE CO. PACA Docket No. RD-87-79. Default order issued January 28, 1987.

Respondent was ordered to pay complainant, as reparation, $4,623.50 plus 13 percent interest thereon per annum from August 1, 1985, until paid.

GEORGE E. DENT SALES INC. *v.* STACEY-LYNN COMMISSARY INC. PACA Docket No. RD-87-80. Default order issued January 28, 1987.

Respondent was ordered to pay complainant, as reparation, $7,092.60 plus 13 percent interest thereon per annum from March 1, 1986, until paid.

FRANCISCO DISTRIBUTING COMPANY *v.* INTERNATIONAL A. G. INC. PACA Docket No. RD-87-81. Default order issued January 28, 1987.

Respondent was ordered to pay complainant, as reparation, $9,206.00 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

ACTION PRODUCE *v.* JOE PINTO & SON. PACA Docket No. RD-87-83. Default order issued January 28, 1987.

Respondent was ordered to pay complainant, as reparation, $3,397.50 plus 13 percent interest thereon per annum from October 1, 1985, until paid.

GRIMMWAY FARMS v. JOE PINTO & SON. PACA Docket No. RD-87-84. Default order issued January 28, 1987.

Respondent was ordered to pay complainant, as reparation, $3,287.20 plus 13 percent interest thereon per annum from September 1, 1985, until paid.

GEORGE S ADAMS d/b/a ADAMS FRUIT & IMPORTING CO v. A & J FAMILY PRODUCE PACA Docket No. RD-87-85. Default order issued January 28, 1987

Respondent was ordered to pay complainant, as reparation, $29,951 67 plus 13 percent interest thereon per annum from December 1, 1985, until paid

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SOL SALINS INC v. CAPITAL CITY PRODUCE CO. PACA Docket No RD-87-86. Default order issued January 28, 1987.

Respondent was ordered to pay complainant, as reparation, $9,475.15 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

MISCELLANEOUS REPARATION DEFAULT ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

SIX L'S PACKING COMPANY, INC v. BOLER FARMS. PACA Docket No. RD-86-362. Order issued January 9, 1987.

ORDER REOPENING AFTER DEFAULT

(Summarized)

Respondent filed a motion to reopen this proceeding after default. Good reason was shown why the relief requested in the motion should be granted.

Accordingly, respondent's default in the filing of an answer was set aside and the proposed answer submitted by respondent was ordered filed.

[The new docket number is PACA 2-7392.—Editor]

TOM LANGE COMPANY INC. v. MELON PRODUCE, INC. PACA Docket No. RD-86-398. Order issued January 9, 1987.

ORDER TO SHOW CAUSE WHY COMPLAINT SHOULD NOT BE DISMISSED

(Summarized)

It is evident that there is a case pending in United States District Court which appears to involve the same parties and issues as this reparation proceeding. The Act clearly provides that an allegation of liability under the Act can be pursued before the Secretary or in a court of competent jurisdiction, but not in both forums.

Therefore, complainant was given 10 days to show cause why its complaint should not be dismissed because of the District Court action against respondent involving the same issues as this reparation proceeding.

MILAS G. RUSSELL, JR. v. DON PELUCCA. PACA Docket No. RD-86-444. Order issued January 21, 1987.

DENIAL OF MOTION TO REOPEN AFTER DEFAULT

(Summarized)

A default order had been issued in this proceeding. The Department received a petition to set aside the default, filed by respondent.

Respondent's motion was received by the Department one day after the default order became final. The Department has no jurisdiction to reconsider a decision after the decision has become final due to the expiration of the time allowed for filing a petition for review. Therefore, the Secretary was without jurisdiction to consider respondent's motion.

Respondent argues that complainant failed to file a motion for default and a proposed decision, in accordance with 7 C.F.R. § 1.139, and asserts that the default order became final sometime after November 7, 1986, as 7 C.F.R . § 1.139 states that the order shall become final 35 days after service on the respondent. Respondent's reliance on section 1.139 is misplaced, as sections 1.130 through 1.151 are clearly stated not to apply "to reparation proceedings under section 6(c) of the Perishable Agricultural Commodities ACt, 1930." 7 C.F.R. § 1.131(a). The applicable Rules of Practice are 7 C.F.R. §§ 47.1-47.25, which provide no support for respondent's claims of procedural defects.

Respondent's motion to reopen after default was, therefore, denied.

A. DUDA & SONS, INC. v. INTERNATIONAL A. G. INC. PACA Docket No. RD-86-499. Order issued January 21, 1987.

ORDER OF DISMISSAL

(Summarized)

Prior to the issuance of a default order, respondent submitted a letter alleging that complainant had filed suit against it in state court, apparently connected with the subject matter of the reparation complaint.

Complainant was ordered to show cause why its complaint should not be dismissed due to the concurrent maintenance of this reparation proceeding and a court suit, pursuant to 7 U S C § 499e(b). Complainant failed to respond

Therefore, the complainant was dismissed

THE TOBI COMPANY, INC. v. UNITED PACKING CO. PACA Docket No RD-86-306. Ruling and order issued January 23, 1987.

RULING AGAINST DISMISSAL OF COMPLAINT AND ORDER REOPENING AFTER DEFAULT

(Summarized)

Respondent filed a motion to reopen the proceeding after default claiming that it was a different entity than complainant's customer, as a result of a change of ownership subsequent to the transactions at issue.

Complainant alleges that it was never notified of any change of ownership of the company with whom it engaged in the transactions subject to the complaint, and had no reason to assume that respondent was not the party responsible for payment. Therefore, in view of these assertions, the complaint was not dismissed at this time. It was concluded that good reason was shown why the relief requested in the motion should be granted.

Accordingly, respondent's default in the filing of an answer was set aside. Respondent was given ten days from receipt of this Order to file an answer, in triplicate.

[The new docket number is PACA 2-7414 —Editor]

SUNWORLD PACKING CO. OF WASHINGTON INC. v. M.L. GALLOWAY INTERNATIONAL INC. PACA Docket No. RD-86-434. Order issued January 23, 1987.

ORDER REOPENING AFTER DEFAULT

(Summarized)

Complainant objected to respondent's motion to reopen after default.

Respondent presented a good reason for reopening this proceeding after default. Therefore, respondent's motion to reopen was granted.

Respondent was given ten days from its receipt of this order to file a timely answer. Its failure to do so will result in the immediate issuance of a default order.

[The new docket number is PACA 2-7409.—Editor.]

GOLD COAST PACKING INC. *v.* MELON PRODUCE INC. PACA Docket No. RD-86-395. Order issued January 27, 1987.

ORDER DENYING MOTION TO REOPEN, VACATING STAY ORDER, REINSTATING DEFAULT ORDER

(Summarized)

Respondent moved to reopen this proceeding after default. Complainant filed a motion, opposing the motion to reopen.

Respondent's explanations did not constitute good reasons why an answer was not timely filed. Therefore, the motion to reopen after default was denied.

The Default Order, previously issued, was reinstated. The amount awarded in such order was ordered paid within 30 days from the date of this order.

EDWARD J. SENINI, SR. *v.* I. R. JEROME COMPANY, LTD. PACA Docket No. RD-87-49. Order issued January 27, 1987.

ORDER OF DISMISSAL

(Summarized)

The respondent failed to file an answer to the complaint and was in default. However, a subsequent review of the complaint revealed that it was not timely filed, as the causes of action accrued far earlier than nine months prior to the date on which the complaint was filed. Therefore the Secretary was without jurisdiction over the subject matter of the complaint.

Accordingly, the complaint was dismissed.

In re: MARTIN T. WALKER P.Q. Docket No. 42. Decision filed November 13, 1986.

Failure to subject baggage to inspection.

Respondent failed to subject his baggage to inspection at the inspection station prior to attempting to board a plane. Respondent was assessed a civil penalty of $150.00.

Jaru Ruley, for complainant.

Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is an administrative proceeding pursuant to the Plant Quarantine Act, as amended (7 U.S.C. § 151 et seq.), and the regulations promulgated thereunder. The complaint, filed on December 27, 1984, alleged that the respondent failed to present luggage for inspection by Animal and Plant Health Inspection Service (APHIS) officials as required by controlling regulation (7 C.F.R. § 318.13-12). Respondent filed an answer on January 25, 1985, in which he advised that he now resided in Honolulu, Hawaii. Complainant filed a motion for a hearing on July 17, 1986, in which it requested that this proceeding be scheduled for hearing in Honolulu, Hawaii, along with other cases involving alleged violations of the Plant Quarantine Act.

A notice of hearing was issued on August 26, 1986, advising the parties that the hearing would be held on November 3, 1986. The notice that was mailed to respondent at the Honolulu, Hawaii, address he had provided was returned unclaimed. On October 16, 1986, the clerk in the Office of the Hearing Clerk, U.S. Department of Agriculture, advised that the service of these papers had been completed by remailing by regular mail in accordance with section 1.147(b) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary. On October 31, 1986, Mr.Walker called to advise me that he had moved to Walnut, California, and that he could not afford to travel to Hawaii. Mr. Walker was asked how he had learned of the hearing taking place in Hawaii and he advised that his brother had received the notice of hearing and had told him of it by telephone. Mr. Walker was advised that he had been given notice of the hearing in the requisite manner and that the hearing would go forward in Honolulu, Hawaii, on November 3 as scheduled, but that I would confront the government witnesses with the letter he had sent the Hearing Clerk as his answer, and inquire of them as to the truth of his statements.

On November 3, 1986, at 10:00 a.m., the scheduled hearing took place in Honolulu, Hawaii. Mr. Walker was not in attendance. Complainant was represented by Jaru Ruley, Esq., Office of the General

Counsel, U.S. Department of Agriculture. I advised Mr. Ruley of my conversation with Mr. Walker and he objected to any postponement of the hearing and requested that the hearing go forward as scheduled. Among the witnesses called by complainant was Mr. Wilmer Snell, the APHIS inspector who "wrote up" Mr. Walker for entering a sterile area with a bag that was not empty. Mr. Snell responded completely to the statements contained in respondent's answer.

Upon consideration of the record evidence, I have concluded that Mr. Walker did violate the regulations and thereby the Act and that the explanation given in his answer is insufficient to exculpate him. However, there was no evidence of culpable intent in this case and in light of all of the circumstances as explained by the inspector, I have concluded that the $250.00 penalty requested by the complainant should not be entered but that the respondent should instead be assessed a penalty of $150.00 . An Order to that effect is being entered herewith.

Findings

1 Martin T. Walker, herein referred to as the respondent, is an individual whose address is 19261 Riviera Drive, Walnut, California 91789

2. On or about June 9, 1984, the respondent attempted to board a United Airlines plane in Honolulu, Hawaii, in violation of section 318.13-12 of the regulations (7 C.F.R. § 318.13-12) in that he failed to subject his baggage to inspection at the inspection station, as required.

Conclusion

By reason of the facts set forth in Finding No. 2, *supra* the respondent has violated the Act and the regulations pursuant thereunder. Accordingly, the following order is being entered.

Order

The respondent is hereby assessed a civil penalty of one hundred fifty dollars ($150.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order in that amount to Jaru Ruley, Esq., Office of the General Counsel, Room 2416A South Building, United states Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this Order.

The Order shall become effective on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 C.F.R. 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final January 3, 1987.—Editor]

PLANT QUARANTINE ACT

In re: RIISE SHIPPING, INC. P. Q. Docket No. 64. Decision filed December 8, 1986.

Storage of garbage aboard vessel in uncovered receptacles—Civil penalty—Failure to answer complaint.

Jaru Ruley, for complainant.

Respondent, *pro se.*

Decision issued by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the storage and disposal of foreign garbage aboard vessels while in the territorial waters of the United States (7 C F R. § 330 400 and 9 C.F.R § 94 5), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C F R § 93 1 *et seq.*, 7 C F.R. § 380.1 *et seq.* and 7 C.F R § 1 130 *et seq.*

This proceeding was instituted by a complaint filed on March 7, 1985, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about October 2, 1984, the respondent stored foreign origin garbage aboard the vessel M/V Republic Del Ecuador which was docked at City Dock 30, Houston, Texas, in violation of sections 330.400(b)(1) and 94.5(b)(1) of the regulations (7 C.F R. § 330.400(b)(1) and 9 C F R. § 94.5(b) (1)) in that the regulated garbage was stored outside the vessel's guard rail in uncovered receptacles Respondent failed to submit an answer to the complaint, such failure being deemed, by the Rules of Practice, an admission of the allegations and a waiver of hearing. (See, 7 C.F.R. §§ 1.136 and 1.139)

Accordingly, the material facts alleged in the complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding.(7 C.F.R. § 1.139).

Findings Of Fact

1. Respondent, Riise Shipping, Inc , is a corporation incorporated under the laws of the State of Louisiana and having its principal place of business at 609 Fannin Street, Suite 417, Houston, Texas 77002

2. On or about October 2, 1984, the respondent stored regulated garbage aboard the vessel M/V Republican Del Eduador which was docked at City Dock 30, Houston, Texas, in violation of sections 330.400(b)(1) and 94.5(b)(1) of the regulations (7 C.F.R § 330.400(b)(1) and 9 C.F.R. § 94.5(b)(1)), in that the garbage was in uncovered receptacles outside the vessel's guard rail.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated sections 330 400(b)(1) and 94 5(b)(1) of the regulations (7 C.F.R. § 330.400(b)(1) and 9 C.F.R. § 94 5(b)(1)).

Therefore, the following Order is issued.

Order

The respondent, Ruse Shipping, Inc., is hereby assessed a civil penalty of five hundred dollars ($500.00). This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This decision and order became final January 22, 1987.—Editor]

In re: JESUS VALDEZ. P. Q. Docket No. 185. Decision filed November 7, 1986.

Importation of avocados without required permit—Civil penalty—Default.

Kevin B. Thiemann, for complainant.

Respondent, *pro se*.

Decision issued by Dorothea A. Baker, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151–164a and 167) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated Subpart 319.56 of the regulations promulgated thereunder (7 C.F.R. Subpart 319.56). Copies of the complaint and the Rules of Practice Governing Proceedings Under the Act were served by the Hearing Clerk, by certified mail, upon the respondent on February 26, 1986.

Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegation in the complaint would constitute an admission of each allegation pursuant to section 1.141 of the Rules of Practice (7 C.F.R. § 1.141) and a waiver of hearing. The letter of service also advised the respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver on respondent's part of an oral hearing. Respondent has failed to respond in any manner to allegations in the complaint and has not requested an oral hearing.

Respondent's failure to deny or otherwise respond to the allegations in the complaint constitutes an admission of such allegations, pursuant to section 1.136(c) of the Rules of Practice [7 C.F.R. § 1.136(c)]. Respondent's failure to request an oral hearing constitutes a waiver of such hearing. There being no basis for a hearing, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

Findings of Fact

1. Jesus Valdez, herein referred to as the respondent, is an individual whose address is 3720 Pinder, Laredo, Texas 78040

2. On or about August 8, 1985, the respondent imported into the United States at Laredo, Texas from Mexico two (2) avocados in violation of Subpart 319 56 of the regulations (7 C.F R Subpart 319 56), because the avocados were not imported under permit, as required.

Conclusions

Respondent has failed to respond in any manner to the allegations of the complaint. By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations promulgated thereunder. Therefore, the following order is issued.

Order

Respondent Jesus Valdez is hereby assessed a civil penalty of seven hundred fifty dollars ($750.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250- 1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C F.R. § 1.145).

[This default decision and order became final January 22, 1987.-Ed.]

In re: TEJADA LUNA. P.Q. Docket No. 242. Decision filed November 7, 1986.

Importation of mangoes without required permit—Civil penalty—Default.

Kevin B Thiemann, for complainant

Respondent, *pro se*.

Decision issued by Dorothea A. Baker, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151–164a and 167) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 319.56 of the regulations promulgated thereunder (7 C.F.R. § 319.56). Copies of the complaint and the Rules of Practice Governing Proceedings Under the Act were served by the Hearing Clerk, by certified mail, upon the respondent on August 1, 1986.

Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegations in the complaint would constitute an admission of each allegation pursuant to section 1.141 of the Rules of Practice (7 C.F.R. § 1.141) and a waiver of hearing. The letter of service also advised the respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver on respondent's part of an oral hearing. Respondent has failed to respond in any manner to allegations in the complaint and has not requested an oral hearing.

Respondent's failure to deny or otherwise respond to the allegations in the complaint constitutes an admission of such allegations, pursuant to section 1.136(c) of the Rules of Practice [7 C.F.R. § 1 136(c)]. Respondent's failure to request an oral hearing constitutes a waiver of such hearing. There being no basis for a hearing, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

Findings of Fact

1. Tejada Luna, herein referred to as the respondent, is an individual whose address is 610 W. 204 Street #C4, New York, New York 10034.

2. On or about May 13, 1984, the respondent imported into the United States at John F. Kennedy International Airport, Jamaica, New York, from the Dominican Republic, two (2) mangoes, in violation of section 319.56(c) of the regulations [7 C.F.R. § 319.56(c)], because the mangoes were not imported under permit, as required by section 319.56-2(e) of the regulations [7 C.F.R. § 319.56-2(e)].

Conclusions

Respondent has failed to respond in any manner to the allegations of the complaint. By reason of the Findings of Fact set forth above, the

respondent has violated the Act and the regulations promulgated thereunder. Therefore, the following order is issued.

Order

Respondent Tejada Luna is hereby assessed a civil penalty of five hundred dollars ($500.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be sent to "USDA, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403," within thirty (30) days from the effective date of this order. Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 242.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This default decision and order became final January 23, 1987.—Editor]

In re: FRANCISCO GONZALES, JR. P.Q. Docket No. 276. Decision filed December 12, 1986.

Importation of limes without required permit—Civil penalty—Default.

Kevin B Thiemann, for complainant.

Respondent, *pro se*

Decision issued by William J. Weber, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151-164a and 167) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated Subpart 319.56 of the regulations promulgated thereunder (7 C.F.R. Subpart 319.56). Copies of the complaint and the Rules of Practice Governing Proceedings Under the Act were served by the Hearing Clerk, by certified mail, upon the respondent on September 9, 1986.

Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegation in the complaint would constitute an admission of each allegation

pursuant to section 1.141 of the Rules of Practice (7 C.F.R. § 1.141) and a waiver of hearing. The letter of service also advised the respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver on respondent's part of an oral hearing. Respondent has failed to respond in any manner to allegations in the complaint and has not requested an oral hearing.

Respondent's failure to deny or otherwise respond to the allegations in the complaint constitutes an admission of such allegations, pursuant to section 1.136(c) of the Rules of Practice [7 C.F.R. § 1.136(c)]. Respondent's failure to request an oral hearing constitutes a waiver of such hearing. There being no basis for a hearing, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

Findings of Fact

1. Francisco Gonzales, Jr., respondent, is an individual whose address is 1111 Beltway 8, No. 59, Pasadena, Texas 77503.

2. On or about August 1, 1985, the respondent imported into the United States at Hidalgo, Texas, from Mexico, approximately two (2) kilos of limes in violation of Subpart 319.56 of the regulations (7 C.F.R. Subpart 319.56), because the limes were not imported under permit, as required.

Conclusions

Respondent has failed to respond in any manner to the allegations of the complaint. By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations promulgated thereunder. Therefore, the following order is issued.

Order

Respondent Francisco Gonzales, Jr., is hereby assessed a civil penalty of seven hundred fifty dollars ($750.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be sent to "USDA, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403," within thirty (30) days from the effective date of this order. Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 276.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal within 30 days after service to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This default decision and order became final January 26, 1987.—Editor]

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